THE

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Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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BENGAL SECRETARIAT LIBRARY

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re LICENSED VICTUALLERS' MUTUAL TRADING ASSOCIATION. *Ex parte* AUDAIN.

C. A.
1889
March 21, 25.

Company—Winding-up—Contributory—Shares—Issue at a Discount—Application—"Underwriting" Contract—"Underwriting at a Discount."

After the formation of a company, and before its shares had been fully offered to the public, *H. & Co.* by letter agreed with an agent of the company to "underwrite" 10,000 shares "at 15 per cent. discount," and "to pay the application money upon any balance of shares required to make up the 10,000." In pursuance of this agreement, and without any further application by *H. & Co.*, 8555 shares were allotted to them. *H. & Co.* returned the allotment notice, and wrote declining to take the shares.

The company shortly afterwards went into liquidation, and the liquidator entered the name of *H. & Co.* upon the list of contributories in respect of these shares:—

Held, by the Court of Appeal, after hearing expert evidence as to the meaning of the term "underwriting" as applied to shares to be issued by a company, first, that the agreement to underwrite must be treated not merely as a guarantee, but as an application for an allotment of so many of the 10,000 shares as should not be applied for by the public, and that such agreement authorized the secretary to issue an allotment to *H. & Co.*; and

Held, secondly, that the word "discount" in the agreement must be construed as "commission," so that the agreement was not one to issue shares at a discount; and

Held, accordingly, that *H. & Co.* had been rightly settled upon the lis of contributories.

The judgment of *Chitty*, J., affirmed.

AFTER a company called the *Licensed Victuallers' Mutual Trading Association, Limited*, had been formed, but before its

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shares had been fully offered to the public, *George Rudall*, an agent of the company, applied on its behalf to *Claude Audain*, a stock broker and financial agent, who traded as *Holloway & Co.*, to "underwrite" a portion of its shares, which were of the nominal value of £1 each, and an agreement was entered into between them, which was embodied in two letters dated the 19th of March, 1888.

The first of these letters was written to *Holloway & Co.* by *George Rudall*, and was as follows:—

"Gentlemen,—In consideration of your underwriting £10,000 'A' shares in the *Licensed Victuallers' Mutual Trading Association, Limited*, at 15 per cent. discount, I, acting on behalf of the company, undertake that all applications which have been received up to the present time, or may be received within one week of the closing of the lists, shall be allotted in full from the said 10,000 shares underwritten by you.

"Yours truly,
"*Geo. Rudall.*"

The second letter was written to *George Rudall* by *Audain*, and was as follows:—

"Dear Sir,—Referring to your favour of even date, copy of which we inclose, we hereby agree to underwrite £10,000 'A' shares in the *Licensed Victuallers' Mutual Trading Association, Limited*, on the terms named therein.

"Yours faithfully,
"*Holloway & Co.*

"P.S.—We further agree to pay the application money upon any balance of shares required to make up the 10,000 within one week's date.

"*Holloway & Co.*"

On the 14th of April, 1888, the company proceeded to allotment, and 8555 shares were in pursuance of the agreement thus constituted, and without any further application for them being made, allotted to *Claude Audain* under the name of *Holloway & Co.* Notice of such allotment was given to him on the same day.

On the 17th of April, *Claude Audain* returned to the company

the notice of allotment which had been sent to him, and at the same time wrote to the secretary declining to take the shares.

On the 23rd of May a resolution was passed for the voluntary winding-up of the company, and on the 16th of July an order was made that the voluntary winding-up should be continued under the supervision of the Court.

On the 17th of August, 1888, the liquidator settled the name of *Holloway & Co.* on the list of contributories in respect of these 8555 shares.

Claude Audain then applied to be removed from the list of contributories, and his motion for that purpose came on before Mr. Justice *Chitty* on the 20th of December, 1888.

Mr. Justice *Chitty* considered that the letter (Mr. *Audain's* letter of the 19th of March, 1888) must be treated as an application for so many of the 10,000 shares to which the underwriting agreement extended as might not be applied for by the public, *i.e.*, for the 8555, and that whatever question might have been raised at the time, the case was merely the common case struck at by the 25th section of the *Companies Act*, 1867. The parties, his Lordship said, were apparently not aware of the fact that issuing shares at a discount of 15 per cent. was beyond the powers of the company; and he held that the application not having been made until after the winding-up, must be refused with costs.

From this decision *Claude Audain* appealed.

Buckley, Q.C., and *John Chester*, for the Appellant:—

The letters which passed between *Audain* and *Rudall* did not constitute any contract on *Audain's* part to take shares in the company. The agreement to underwrite 10,000 shares merely amounted to an undertaking that that number of shares should be taken by the public, upon the terms that if he applied he was to receive 15 per cent. on the amount. It was in fact not an agreement to take, but an agreement to place, shares: *Gorrissen's Case* (1); *Wynne's Case* (2); *Beck's Case* (3). But if there was any contract to take shares it was a contract to take them at a discount, and therefore void: *In re Almada and Tirito Com-*

(1) Law Rep. 8 Ch. 507. (2) Law Rep. 8 Ch. 1002.
(3) Law Rep. 9 Ch. 392.

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pany (1); and an application to remove the Appellant's name from the register may be made notwithstanding the winding-up: *Ship's Case* (2); *Howard's Case* (3).

Napier Higgins, Q.C., *Romer*, Q.C., and *Eustace Smith*, for the liquidator:—

"Underwrite" here means take. The clear meaning and intent of the agreement was that *Holloway & Co.* should take and "pay the application money" for so many of the 10,000 shares as were not applied for by the public. If the public had applied for the whole amount, the Appellant would have received this commission, and he cannot await the result and then repudiate the contract.

Buckley, in reply:—

There is, at all events, no application, except an application to take shares at a discount, and the allotment is inconsistent with, and is not an acceptance of such an application. It is not what the applicant asked for.

After this argument the Court directed the case to stand over in order that expert witnesses might be called to explain the meaning of the expressions "underwriting" and "underwriting at a discount" as applied to shares in a public company.

1889. March 25. Two expert witnesses were now called on behalf of the liquidator, viz., Mr. *Harry H. Marks*, the editor and one of the proprietors of the *Financial News*, and Mr. *Henry Osborn O'Hagan*, the managing director of the *City of London Contract Corporation, Limited.* According to their evidence there was an understood and recognised meaning attached to the word "underwriting" as applied to shares about to be issued by a company in process of formation. It meant a practice established for many years, under which, before the public issue by such a company of its shares, persons who were willing for a consideration to guarantee the subscription of the capital, by contract in writing, agreed with the company or its agent, for a specified commission, that in the event of the whole issue not being sub-

(1) 38 Ch. D. 415. (2) 13 W. R. 450.
(3) Law Rep. 1 Ch. 561.

scribed for by the public, they would take an allotment of the remainder in proportion to the amount specified in the agreement. Either the whole or a portion of the capital might be underwritten, and under an ordinary underwriting agreement the underwriter became liable for the balance of the shares, and received the commission upon the whole amount underwritten whether he had to take shares or not. Fifteen per cent. was not an unusual rate for underwriting, but the term "underwriting at a discount" was unusual, and no technical meaning was attached to it. To "place" in the market was very different from to "underwrite." It frequently happened that the underwriting contract was accompanied by the formal application, but if it was not, the usual course was to ascertain how many shares had been subscribed for, and to call upon the underwriter to sign an application for the remainder; but in many cases the underwriting agreement established a contract to take the shares at once, and shares would be allotted in pursuance of that contract.

No witnesses were called on behalf of the Appellant.

Buckley, Q.C., for the Appellant:—

Upon the evidence a person who "underwrites" guarantees the subscription of the company's capital for a consideration. "Underwriting" really means undertaking an obligation to subscribe in the future.

COTTON, L.J.:—

This is an appeal from the refusal of Mr. Justice *Chitty* to relieve the Appellant from liability in respect of a number of shares which had been allotted to him in a company now being wound up, as the balance required to make up a certain number of 10,000 shares. The substantial question is whether the Appellant is or is not under any liability at all in respect of the shares so allotted to him. That question turns upon the contract, and the contract, if any, is to be found in the underwriting agreement which was entered into between the Appellant and an agent of the *Licensed Victuallers' Mutual Trading Association.* From the evidence which has been given as to the meaning of the expression "underwriting" as applied to shares, it appears

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that an "underwriting" agreement means an agreement entered into before the shares are brought before the public, that in the event of the public not taking up the whole of them, or the number mentioned in the agreement, the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for. That is what is meant when it is said that a person has agreed to underwrite a certain number of shares in a company, and that is in my opinion what was meant by the term "underwrite" in the present agreement. "Underwriting" is a well-known thing in connection with the formation of companies. The Appellant in agreeing to "underwrite" a certain number of shares has agreed to do this particular thing, and in my opinion he is just as much bound in equity as if the thing which he was to do had been set out at length in the contract which was entered into. [His Lordship then read the letters of 19th of March, 1888, and continued:—] It appears to be the usual course that some formal application should be made for the shares, and it is said that there should have been some formal application made for allotment of the shares in the present case. But the postscript to the letter written by the Appellant shews that he considered that what he had done amounted to an application, and that he himself treated the letter not only as a guarantee, but as an application for allotment, and in my opinion it must be regarded as an application to take the balance of the shares required to make up the £10,000.

A further question arises as to the meaning of the expression underwriting "at 15 per cent. discount." It appears from the evidence that the expression "discount" is an unusual term in connection with the underwriting of shares, and that it is not a term to which any meaning of art can be given; and it further appears that under an underwriting agreement a commission is paid on all the shares to which the agreement applies, whether taken by the public or by the underwriter himself. But the Court must put a construction on the word. And I think that upon the fair construction of the words used, they mean not "discount" in the proper sense of the term, but merely "commission," the amount to be paid to the underwriter in respect of the shares which he underwrote. It is not really a sum to be

deducted from the nominal amount of the shares when they are applied for and allotted, but a sum to be paid on all the shares underwritten. That being so, it was not an agreement to allot shares at 15 per cent. discount, but to pay 15 per cent. commission to the Appellant in consideration of his having made the contract with the company. I think therefore that the decision of Mr. Justice *Chitty* was right in not removing the Appellant's name from the register in respect of these shares. The appeal must accordingly be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. The case is one of very considerable importance to persons engaged in promoting companies, and the doubt the Court had upon it was with reference to the expression "underwriting," of which, as applied to shares, we did not know the exact meaning. We did not know whether it had any technical meaning in the line of business to which this matter relates. We have now had the advantage of the evidence of two gentlemen who are accustomed to this kind of business, and the result of their evidence is, I think, clear enough. "Underwrite" does not mean "place," the meaning of which expression is well known. See *Gorrissen's Case* (1). It means more than that. "Underwriting," in this kind of business, means agreeing to take so many shares, more or less in number, as are specified in the underwriting letter if the public do not subscribe for them. There is no doubt now that that is the meaning of "underwriting."

Then a question arises as to what was meant by underwriting "at 15 per cent. discount." That is an ambiguous expression. It may mean that the shares to be taken by the underwriter are to be issued to him at a discount, that is to say, that he is to receive certificates to the effect that those shares are fully paid up to the extent of 15 per cent. Upon the other hand, it may mean simply "commission," or it may have no definite meaning at all. I do not think that the letters can be construed as using the word "discount" in the first of these two senses. I do not see that there is anything whatever in them to bind the com-

(1) Law Rep. 8 Ch. 507.

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pany, if it could be bound, to issue shares at a discount, and to do that which was wholly *ultra vires*. The true meaning is that in consideration of receiving 15 per cent. the Appellant will underwrite so many shares. That makes the agreement perfectly consistent and businesslike, and in accordance with the intention of both parties. The postscript throws this light upon it—that it displaces or removes any suggestion that there was to be any fresh or formal application for shares. It is an agreement to take shares, and the Appellant says: "We further agree to pay the application money upon taking the shares." There is here a clear agreement to take 10,000 shares, or so many as the public do not take. That clearly authorizes the secretary to issue an allotment to the Appellant, and consequently he is rightly placed upon the list of contributories. The appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion, and for the same reasons. After hearing the evidence there can be no doubt as to what "underwriting" means in the minds of those who are familiar with transactions of this kind. The postscript to the second letter shews that those who underwrote and accepted a contract for underwriting understood that there was to be no further application for shares—that the shares were to be allotted on the original contract to take. The truth is that the only difficulty which remains is created by the term "discount," which is an inartistic term as applied to underwriting. In regard to such a transaction as this, "discount" is an unusual term which the witnesses have never seen before, and the Court has to construe it. However, when once we understand the transaction which was meant by "underwriting," and bring our minds to bear on the documents in question with the light which that knowledge affords, we see that it was not intended that the shares should be taken at a discount, and that the word "discount" in this letter is used to indicate the commission which is to be paid to the underwriter.

Solicitors: *H. Batt; F. G. Gorton.*

W. W. K.

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[1887 D. 2251.]

Appointment in Fraud of Power—Policy of Assurance—Measure of Liability of Estate of Appointor—Restitution.

A sum of stock was settled in 1834 upon trust to keep up a policy of assurance on the life of *D.*, and subject thereto upon trust for *D.* for life, and after his decease the fund and the moneys payable under the policy were to be held in trust for his three children, or such one or more of them, and in such shares and proportions, as *D.* should by deed or will appoint. In 1849 and 1850, *D.* and the three children released the trustees from the stock and from all liability to keep up the policy, *D.* entering into a covenant to keep it up, and the stock was transferred by the trustees. In 1852 *D.* appointed the policy to *B.*, one of his daughters, to her separate use, without restraint on anticipation, upon a bargain with her that she should surrender the policy and pay the money to him. He promised her to effect and keep on foot a fresh policy, and to settle it upon the same trusts as the old one. The trustees, having no notice of the bargain, transferred the policy to *B.*, who surrendered it to the office and paid the proceeds to *D.* *D.* effected the new policy, but failed to devote it effectually to the trusts. The money received on the surrender of the policy was £897, but the sum which would have been payable under it if it had been kept on foot till *D.'s* death was more than £5000:—

Held, by *Kekewich*, J., that the appointment was invalid, and that *D.'s* estate after his death was liable not merely for the £897 which he had received, but for the sum which would have been received under the policy if it had been kept on foot, for that *D.* had virtually received the policy; and that the £5000 must be raised out of his estate and be distributed as in default of appointment:

Held on appeal, that (apart from the question of *B.'s* concurrence) this was the correct measure of liability, for that a person making a fraudulent appointment ought to be held liable to make good the whole loss occasioned by it to the trust estate, and that, moreover, *D.* was liable under his covenant to make good all loss arising from his not having kept the policy on foot; but that *B.* having been an active party to the transaction could not complain of it, and that the amount payable by *D.'s* estate must be diminished by the share which she, if not a party to the transaction, would have taken in default of appointment, and that *D.'s* promise to settle a fresh policy, which promise he failed to keep, was not a misrepresentation entitling her to say that she had been deceived into concurring in the transaction and was to be treated as if she had not concurred.

By indenture, dated the 20th of March, 1834, *J. B. Deane* assigned to trustees a policy of assurance for £2000 effected by

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him in 1830 on his own life. By the same deed he assigned to the same trustees all annual or principal sums of money to which he was entitled under the will of his father-in-law, *John Lempriere.* The principal sums were to be invested in the names of the trustees, and the trustees were to apply the income in keeping up the policy, and pay so much of the income and of the annual sums as should not be requisite for that purpose to *J. B. Deane* for his life, and it was declared that after his decease the annual sums and the investments of the principal sums and the moneys to be received by virtue of the policy or of any substituted policy should be held in trust for *J. B. Deane's* three children, *Sophia Deane, Henry Deane,* and *Augusta Deane* (afterwards Mrs. *Bridger*), or such one or more, exclusively of the others or other, and in such parts, shares, or proportions as *J. B. Deane* should by deed or will appoint, and in default of appointment in trust for the three children in equal shares, with limitations over as to the shares of any who should die under twenty-one and unmarried, which did not happen. The deed contained a proviso expressly exempting *J. B. Deane* from any personal liability to keep the policy on foot if the annual sums assigned and the income of the invested sums should prove insufficient to do it.

In 1847 the property held on the trusts of the above indenture consisted of the policy and a sum of £2014 16*s.* 1*d.* £3 10*s.* per Cent. Bank Annuities.

By deed-poll, dated the 1st of March, 1847, *J. B. Deane,* in exercise of the power, appointed to *Henry Deane* £1600 to be raised after his own decease. This deed contained a provision for bringing the appointed share into hotchpot.

On the 2nd of March, 1847, *Henry Deane,* in consideration of £1200 advanced to him by *J. B. Deane,* assigned to *J. B. Deane* absolutely £1200, part of the reversionary sum of £1600.

After this the £2014 16*s.* 1*d.* was reduced to £1713 2*s.* by some payments for expenses of the trust, and the stock was changed to £3 5*s.* per cent. stock.

By an indenture dated the 17th July, 1849, made between *J. B. Deane* of the first part, *Sophia Deane* of the second part, *Augusta Deane* (afterwards Mrs. *Bridger*) of the third part, *Henry Deane* of

the fourth part, and the trustees of the deed of the 20th of March, 1834, of the fifth part, reciting, *inter alia*, that *Henry Deane* was entitled to so much of the trust funds as would at the death of *J. B. Deane* produce £400, and that the father and the two daughters were desirous of reducing the £1713 2*s.* stock into immediate possession, and that it had been agreed that £500 stock should be retained by the trustees to meet *Henry Deane's* £400, and the remaining £1213 2*s.* transferred to *J. B. Deane*, and that such transfer had been made, and that it had been agreed that the trustees should not be liable to keep up the policy, *J. B. Deane* having agreed to do so, it was witnessed to the effect that *J. B. Deane* and his three children released the trustees from all demands in respect of the £2014 16*s.* 1*d.*, and from all demands in respect of their not keeping up the policy, with the proviso that this should not release the trustees from the £500 stock retained by them. By this deed *J. B. Deane* covenanted with the trustees to pay the premiums on the policy and keep it on foot.

By indenture of the 16th of January, 1850, *J. B. Deane* and *Henry Deane* released the trustees from all demands in respect of the above £500 stock, which, as therein recited, had been transferred to *J. B. Deane.*

On the 6th of November, 1852, *J. B. Deane* appointed the policy and the moneys to become payable thereunder to Mrs. *Bridger* for her separate use without any restraint on anticipation. The trustees thereupon assigned the policy to Mrs. *Bridger*, and by an indenture of the 24th of November, 1852, were released from all claims in respect of it.

Mrs. *Bridger* in the same year surrendered the policy to the office and received the surrender value, £897 14*s.* This sum she handed over to her father, who paid her £150, and retained the residue.

J. B. Deane died on the 12th of July, 1887, leaving a will, by which he bequeathed £1200 in trust for *Sophia Deane* for life, and after her death as to £300 in trust for Mrs. *Bridger.* Subject thereto he gave the whole of his estate to his second wife, whom he appointed sole executrix.

The present action was commenced by Mr. and Mrs. *Bridger*

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and *Sophia Deane*, described as a person of unsound mind, not so found by inquisition, against the executrix of *J. B. Deane* and the administratrix of *Henry Deane*. By their statement of claim the Plaintiffs alleged that the representative of *Henry Deane* contended that the appointment to Mrs. *Bridger* was a fraud on the power, which the Plaintiffs denied. The Plaintiffs further alleged that the whole of the above dealings with the property comprised in the deed of the 20th of March, 1834, formed in fact one entire family arrangement by which the property was utilised for the benefit of the children in the manner best suited to their requirements; that the appointment to *Henry Deane* was a fraud upon the power unless it could be supported as part of one valid family arrangement, and that it ought to be set aside if the appointment of the policy was set aside. The Plaintiffs claimed relief against the executrix of *J. B. Deane* in respect of an alleged agreement by him to settle certain other policies in favour of Mrs. *Bridger* and *Sophia Deane*, and claimed that in case the appointments, or any of them, should be set aside, an inquiry might be directed what sum would at the death of *J. B. Deane* have been receivable under the policy if the appointments set aside had not been made, and that the amount might be paid out of the estate of *J. B. Deane* and distributed as in default of appointment.

The executrix of *J. B. Deane* resisted the claim, and claimed the benefit of the *Statutes of Limitations*. The administratrix of *Henry Deane* by her defence denied that the series of dealings with the trust funds constituted one family arrangement, or that *Henry Deane* had any notice of the appointment of the policy. She insisted on the validity of the appointment to *Henry Deane*, but alleged that the appointment to Mrs. *Bridger* was a fraud upon the power, inasmuch as it was part of a scheme for enabling *J. B. Deane* to procure payment to himself of the surrender value of the policy. She counter-claimed against the Plaintiffs and the executrix of *J. B. Deane* to have the appointment of November, 1852, set aside, to have the sum which would have been receivable under the policy, if kept on foot, ascertained, and to have the amount distributed as in default of appointment.

If the policy had been kept on foot the sum payable under it

would have been upwards of £5000, a large amount of bonuses having been added to the sums assured.

It was established that the appointment was made to Mrs. *Bridger* on the understanding that the policy should be surrendered and the produce handed to *J. B. Deane*, and that *J. B. Deane* had at the time promised to effect and keep on foot another policy for the benefit of Mrs. *Bridger* and *Sophia Deane*. He did effect and keep on foot this policy, but he did not effectually dedicate it to the purpose for which he had promised to effect it, a memorandum which he signed with reference to it being so worded that in the opinion of the Court it did not constitute a declaration of trust.

The action came on for trial before Mr. Justice *Kekewich* on the 4th of December, 1888. It was hardly contended that the appointment to Mrs. *Bridger* could be supported, and the Court having held it to be a fraud on the power, the question of the measure of liability of the estate of *J. B. Deane* was then argued.

Warmington, Q,C., and *Simmonds*, for the Plaintiffs:—

We claim *restitutio in integrum*. The liability of *J. B. Deane's* estate must not be limited to the surrender value of the policy, but must be extended to the whole amount which the trust estate would have received under the policy at his death if this fraudulent appointment had not been made. He not only got the surrender value of the policy but also obtained relief from payment of the premiums for the rest of his life. The transaction was in fact an assignment to him of the policy and of the moneys payable thereunder at his death, and the measure of his liability is the sum on which the trusts of the settlement would have operated at his death but for the transaction.

Barber, Q.C., and *P. B. Abraham*, for the Defendant *Alice Deane*, argued to the same effect.

Neville, Q.C., and *W. D. Rawlins*, for the Defendant *Louisa Deane*:—

The claim is barred by the *Statute of Limitations*. *J. B. Deane* never was a trustee of this settlement. His liability was under

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his covenant with the trustees to keep the policy on foot, and the breach occurred thirty years ago. The parties liable are the trustees who allowed him to receive the trust funds. But, assuming he knowingly received part of the trust funds, he was not a trustee, and was not bound to put the *cestuis que trust* in the same position as they would have been in if he had not executed the power. His liability is limited to the benefit he obtained. The question is what did he receive? He received £897, and no more, and that is the measure of the liability of his estate. As to Mrs. *Bridger*, she was a party to the transaction, and cannot now take advantage of her own wrong, and is therefore not entitled to recover anything. At any rate she must account for the £150, with interest.

Warmington, in reply.

KEKEWICH, J.:—

This is a novel and interesting point. I have already held that the appointment was a fraud on the power; and it follows of course, that everything that took place in consequence of that appointment also falls to the ground, that is to say, that the assignment and surrender of the policy are inoperative and void. And the question now is, for what amount is *J. B. Deane's* estate liable to those who, but for the appointment, would be entitled to participate in the moneys which would have been payable under the policy at his death. It is said that he having been a party to a breach of trust must be made liable as though he were a trustee. To my mind that is not a satisfactory statement of the law. I think it is going too far to say that if a stranger is a party to a breach of trust therefore he is liable to perform the duties cast upon the trustees, and stands in the same position as they do, and must make restitution, that is, make good all that the trust estate has lost. I am aware of no principle which goes to that extent. The question that arises here is, on what principle and for what amount must a person, not a trustee, who is a party to a breach of trust be made liable? Mr. *Neville* says the measure of liability is—what did *J. B. Deane* receive? I think that is a fair way of putting it, and to my mind the answer here

is "You received the policy, that is, the engagement of the assurance company to pay a certain sum on your death with all bonuses and additions." That is what he received and what he got rid of, and, as the appointment is set aside, that is what I hold he must restore to the trust. He received the policy, and in point of law I must regard it as existing until his death, and I do not think it lies in his mouth to say that he surrendered it; and as the amount payable under it is agreed at £5470, that is the sum which must be made good to the trust estate by his executrix, with interest at 4 per cent. Then there is another point. It is said that because Mrs. *Bridger* was a party to the legal fraud, therefore she is not entitled to any share in the money which she assisted to take from the trust. But no authority has been cited to shew that she cannot share in what is now divisible in default of appointment, and I am not disposed to exclude her. I think, however, that I cannot allow her to share without bringing into account the £150 she received out of the £897, with interest at 4 per cent. As to the costs, the whole of this litigation is due to Mr. *Deane* negotiating with his children with respect to the trust property, and I think that all the costs must come out of his estate.

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Louisa Deane, the personal representative of *J. B. Deane*, appealed from this judgment, and the appeal was heard on the 22nd and 23rd of May, 1889.

Cozens-Hardy, Q.C., and *W. D. Rawlins*, for the Appellant:—

We do not dispute that the appointment to Mrs. *Bridger* was invalid, and that the settlor's estate must refund what he received in consequence of it, but we contend that his estate is not chargeable with anything more. There is no authority for giving equitable damages against a person who, not being a trustee, concurs in a breach of trust; he must refund what he has improperly received, but that is the extent of his liability. The covenant entered into by the settlor to keep the policy on foot was only entered into for the indemnity of the trustees when they gave up the property out of which the premiums were

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payable—they are now subject to no liability, and there is no remedy on the covenant, nor are the Plaintiffs persons who can sue on the covenant. It cannot be said that *J. B. Deane* received the policy, it was received by Mrs. *Bridger*, who surrendered it to the office; there is therefore no ground for saying that he is to be charged on the footing of having received it, and if he did receive it, what he received was worth no more than the surrender value. At all events, whether the Court be against us or for us on the above questions, the liability of *J. B. Deane's* estate must be reduced by one-third of the amount, for Mrs. *Bridger* having been a party to the transaction cannot be heard to complain of it, and cannot recover anything from the settlor's estate in respect of it.

Barber, Q.C., and *P. B. Abraham*, for *Alice Deane*, the legal personal representative of the settlor's son:—

The liability of *J. B. Deane's* estate cannot be confined to the cash he actually received. He virtually and substantially received the policy. The surrender to the office was all part of the bargain with Mrs. *Bridger*, and by its surrender his liability to pay the premiums was in a sense got rid of. We submit that the *cestuis que trust* are entitled to the benefit of his covenant to keep the policy on foot, without the circuity of bringing an action in the names of the trustees. Even if it should be held that the mere fact of this corrupt appointment does not make the appointor liable for the whole loss sustained by the trust estate, the covenant must make him so liable. That covenant must be treated as entered into for the benefit of the *cestuis que trust*, and as forming part of the trust property. There is not much direct authority on the question, but in *Garner* v. *Moore* (1) an executor was held liable for all the sums which would have been recovered if a policy which he allowed to drop had been kept up, and the circumstances were not so strong against him as those of the present case are against *J. B. Deane*. As to the *Statute of Limitations*, there was here a concealed fraud; nobody except *J. B. Deane* and Mrs. *Bridger* had any notice that the appointment to her was made on a bargain, and the statute cannot run

(1) 3 Drew. 277.

until it was discovered, which was not till after *J. B. Deane's* death.

Warmington, Q.C., and *Simmonds*, for the Plaintiffs:—

The Plaintiff *Sophia Deane* is in the same position as Mr. *Barber's* client, and clearly must take her share as in default of appointment. We say that as to the measure of liability Mr. Justice *Kekewich* was right, the policy and the covenant to keep it up constituted the trust property, and by means of the appointment and the bargain *J. B. Deane* practically got the whole into his possession. As regards Mrs. *Bridger*, she was acting under the influence of her father.

[LORD ESHER, M.R.:—Can you possibly make out that a father exercised undue influence over a grown-up daughter who was married, and was not living with him but with her husband.

COTTON, L.J.:—Suppose Mrs. *Bridger* had been the only child, could she have brought this action?].

We say that she could, she concurred in this transaction on the faith of representations by her father that he would effect and keep up a new policy and secure it to his daughters. The father was bound to make good his representations. It has been decided that he did not effectually secure the policy for the benefit of his daughters, but though the memorandum which he signed has been held not to have that effect, it is enough to create an equity against him and estop him from saying that Mrs. *Bridger* was a party to a fraudulent transaction. If a trustee obtains a concurrence in a breach of trust by false representations can he rely on that concurrence to escape liability?

[LORD ESHER, M.R.:—There was no false representation made. *J. B. Deane* only made a promise which he failed to keep.]

When a fraudulent appointment is set aside it will be set aside *in toto*, and the parties so far as possible restored to their original position.

W. D. Rawlins, in reply:—

It is a fallacy to say that *J. B. Deane* got the policy—he got nothing but a sum of money out of the proceeds. If the trustees

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had brought an action on the covenant the *Statute of Limitations* would have been an answer.

[LORD ESHER, M.R.:—Is it not a case where they might wait till damage accrued—*i.e.*, till the death of *J. B. Deane*?]

Even if so it is not to be assumed that he could have paid the premiums, and the probability that he could not must be taken into account.

LORD ESHER, M.R.:—

In this case an improper appointment was made by means of which a policy of assurance was withdrawn from the trust. Mr. *Deane* did a wrongful act in making this appointment, but there was nothing to lead the trustees to suspect that there was anything wrong. They therefore transferred the policy to Mrs. *Bridger*, and so enabled her to surrender the policy, which she did, and handed over the proceeds to her father. The decision of Mr. Justice *Kekewich* that the appointment was invalid is not now questioned, but the trustees were innocently misled—there can be no claim against them in respect of the policy, it is irrecoverably lost to the trust, and the question is whether Mr. *J. B. Deane's* estate is liable to make good the loss, and put the trust estate in the same position as if the wrongful act had not been done. This is the contention of the children—if the father had not made this wrong appointment the policy would have been there with its bonuses, so his estate must make good what would in that event have been received. It is urged on the other hand, that the father might have failed to keep up the policy, and that therefore the sum which would have been received if it had been kept up is not the measure of the damage. But to this I reply, first, that we must not assume that the father would not have done what he had contracted to do—he agreed with the trustees to pay the premiums, and we ought to assume that he would have paid them. Further, this contract to pay the premiums was part of the trust estate, for it was given by the covenantor in lieu of something which formed part of that estate, and the *cestuis que trust* are entitled to the benefit of it without being put to the circuity of bringing an action in the

names of the trustees. So far, therefore, if there were no complications arising from the part taken by Mrs. *Bridger* in the proceedings, the estate of *J. B. Deane* would be liable to make good to the trust estate the money which would have been received on the policy if it had not been taken out of the trusts.

But it is said that Mrs. *Bridger*, who is one of the Plaintiffs, cannot ask for this relief, that she cannot complain of a breach of trust in which she concurred. I am glad that the correspondence has been read to us, for I had been under the impression that the father contrived to have this policy withdrawn from the settlement for his own sole advantage. If that had been so, I should have thought that his conduct was fraudulent, and that his daughter helped him in a fraud. But after hearing all the correspondence, I think that there was no fraud. For some reason or other the father wished to get rid of this policy in order to avoid difficulties from a son who was giving him trouble, and he meant to give an equivalent to the trust estate by means of another policy. The parties intended nothing fraudulent, but they managed matters so badly that there was no effectual substitution of another policy, and the trust estate sustained a loss.

But if there was no fraud, was there not a breach of trust? The original policy was held upon trust, and no one had a right to take it out of the trust without the consent of all persons interested in it. If another policy of equal value had been substituted for it, there would still have been a breach of trust; but if, owing to this substitution, no loss had been sustained, nobody could have complained of the breach of trust. Matters however were managed so clumsily that no effectual substitution took place, and there was a loss for which the father was liable. Mrs. *Bridger* was a party to the invalid appointment by her father. It has been contended on her behalf that she acted under undue influence; but that argument cannot prevail in the case of a woman of mature age living with her husband. Mrs. *Bridger* did not intend to do anything wrong, but she cannot be treated as an innocent party who did not know what she was doing. Then can a party who concurs in a breach of trust come afterwards to complain of it? I am of opinion that she cannot. Mrs. *Bridger*

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is not entitled to recover anything. The other children take as in default of appointment the amounts to which they would have been entitled if the policy had been kept up, having regard to the obligation of *Henry Deane* to bring the £1600 into hotchpot, and the father's estate is liable only for what *Sophia Deane* and *Henry Deane's* representative are entitled to receive.

COTTON, L.J.:—

The principal question is what the estate of the father is to make good. Mr. *Cozens-Hardy* did not contend that the appointment could stand, but he contended that the father's estate was liable only for what the father actually received, not for what would have been recovered on the policy if it had been kept on foot. The policy was assigned by the trustees in pursuance of an appointment made by the father to Mrs. *Bridger* upon the understanding that the policy should be surrendered and the proceeds paid to him, of which understanding the trustees had no notice. I think that (apart from the question as to Mrs. *Bridger's* concurrence) Mr. Justice *Kekewich* was right in holding that the estate of the father was liable for the sum which would have been received under the policy if it had been kept on foot, and not merely for what the father received. It is admitted that the appointment was invalid, and it was only by means of that appointment that the policy ceased to be part of the settled property. If proceedings had been taken at once in respect of the breach of trust, the appointment would have been set aside and the policy restored to the trust. The action was not brought until after the father's death, but it is not suggested that there are any circumstances which prevent its being brought at the later period, and why is the relief obtained to be less than if it had been brought earlier? It is true that there cannot be any restitution of the policy, for not only has it been surrendered, but the life on which it was effected has dropped. If the action had been brought in the father's lifetime after the surrender, then, subject to the questions as to Mrs. *Bridger's* participation in the transaction, a decree would have been made compelling the father to make good the breach of trust by effecting a new policy of the same value as that which the old policy would have had at the

time of the decree. All that can be done now by way of *restitutio in integrum* is to charge the father's estate with the sum which would have been payable at his death under the old policy if it had been kept up.

It was argued that it is not certain that the father would have kept the policy alive, and that we must estimate the probability of his not doing so. In my opinion there is nothing to justify the conclusion that the father would not have kept it up, and the children were so strongly of opinion that he would, as to give up in consideration of his covenant property which was liable to keep it up. We have therefore nothing to consider except what the policy would have produced if kept up.

Sophia Deane and the estate of *Henry Deane* are therefore entitled to be compensated for the loss they have sustained; but can Mrs. *Bridger* complain of the loss? In my opinion she cannot. She was a party to the wrong transaction, she concurred in withdrawing the policy from the trusts. It would be wrong to allow a person who was a party to the transaction to sue her father's representatives in respect of it. It is urged that she concurred without any fraudulent intention, considering that what she was doing was the best thing for the family. I believe that both father and daughter thought what they were doing to be right: but even without legal advice they might have seen it to be wrong. The power was given to the father to enable him to distribute the fund fairly among the children, and both he and Mrs. *Bridger* must have known that it was being used for purposes for which it was not given.

Then it was urged that Mrs. *Bridger* was induced to concur in the scheme by false representations that the father would settle a new policy. There was no false representation. The father promised to settle a new policy, and thought he had done what was effectual for that purpose. It is not false representation for a man to make a promise and fail afterwards to carry it into effect. I think, therefore, that there is no ground for relieving Mrs. *Bridger* from the consequences of her concurring in the breach of trust, and the judgment must be reversed so far as it gives her any share in the sum which would have been produced by the policy if kept on foot. *Sophia Deane* and the representa-

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tive of *Henry Deane* are entitled to receive out of the father's estate the sums to which they would respectively have been entitled if the policy had been kept on foot, regard being had to the obligation of *Henry Deane* to bring the £1600 into hotchpot.

FRY, L.J.:—

I concur in what has been said. The main question in the case is the measure of relief to which the persons interested under the settlement are entitled for the injury done them by what is called a fraud on the power. The father by means of his appointment got possession of a policy which ought to have been kept on foot till his death. The judgment of Mr. Justice *Kekewich* proceeded on two grounds, first, that when a power is fraudulently exercised the persons injured by its exercise are entitled to be put in the same position as if it had not been exercised. If so, the amount which the policy if kept on foot would have realized ought to be paid back to the trust. The same result is arrived at by referring to the covenant into which the father entered in 1849 to pay the premiums on the policy and keep it on foot. That covenant was held by the trustees for the benefit of the persons interested in the policy, and I think the amount recoverable under the covenant is the amount which would have been received if the covenant had been kept. The *Statute of Limitations* appears to me to have no application to the case. I think, therefore, that the measure of relief adopted by Mr. Justice *Kekewich* is the correct one.

I think, however, that Mr. Justice *Kekewich* has not in one respect done justice to the Appellant. Mrs. *Bridger* was an active party in the transaction, she received the surrender value from the office and paid it to her father. Though I believe neither father nor daughter thought they were doing anything wrong, I think that if they had considered the case they would have seen that they were. The policy was made over to a married woman entitled for her separate use without any restraint on anticipation, and she dealt with it according to the bargain made with her father. Under these circumstances can she sue his representatives in respect of the transaction? No authority has been found in support of the view that she can, and I think it would

be very wrong to establish such a rule. The estate of the father therefore will be relieved to the extent of what Mrs. *Bridger* would have been entitled to receive if she had not been a party to the fraud on the power.

Solicitors: *Robbins, Billing & Co.*, agents for *Petgrave, Bath, Bridger & Son; T. F. Adshead.*

H. C. J.

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March 4, 5.
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May 24.

[1888 E. 1377.]

Vendor and Purchaser—Objections to Title—Mortgage to Trustees of Building Society—Power of Sale given to Trustees—Order to wind up Society as an unregistered Company—Powers of Official Liquidators—Restrictive Covenant—Onus of Proof of Injury—Tithe—Apportionment—Abstract—Documents not in Possession of Vendor—Expense of Production—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 92, 95, 96, 199, 203 [*Revised Ed. Statutes, vol. xiv., pp.* 223, 224, 247, 250]—*Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6.

The life estate of a tenant by the curtesy who had become a bankrupt was sold by the trustee in the bankruptcy. The land on which a house which formed part of the property was built was subject to a covenant that no public-house or beershop and no building of less cost than a specified sum should be erected thereon. The contract for sale contained no reference to this covenant. It stated that the existing house was subject to a lease for twenty-one years, determinable at the end of seven or fourteen years, at the yearly rent of £75 for the first seven years of the term, and of £80 for the remainder of the term. The purchaser required proof that the above covenant did not bind him:—

Held, by *North*, J., that under the circumstances the *onus* was on the purchaser to shew that the covenant would interfere with his enjoyment of the property, and that, as he had not shewn this, the objection must be overruled:

Held, on appeal, that as, if circumstances made it advantageous to sell the property, the purchaser could in all probability obtain an order for its sale under the *Settled Estates Act*, and it would sell for less in consequence of the restrictive covenant, the purchaser would be damnified by the covenant, and that this objection to the title was fatal.

The title was traced through the will of a mortgagee. The will was not abstracted in chief, but, in the abstract of a deed of later date, there was a recital that the mortgagee by his will had given all his personal estate to his executors, and had devised all the freehold and copyhold hereditaments

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vested in him upon trust or mortgage to his executors in fee, subject to the trusts and equities of redemption affecting the same:—

Held, by *North*, J., that though, strictly speaking, the will ought to have been abstracted in chief, the purchaser had obtained all the information which he would have got if the will had been so abstracted; and

Also, that, the will not being in the possession of the vendor, the cost of its production would have to be borne by the purchaser.

Part of the property was subject, together with other land not belonging to the vendor, to one tithe rent-charge. The contract for sale contained no provision as to apportionment:—

Held, by *North*, J., and by the Court of Appeal, that the purchaser could not call on the vendor to procure an apportionment at the vendor's expense.

A mortgage was made to the trustees of an unincorporated building society. The mortgage deed provided that, in case of default by the mortgagor, the property should be held upon trust that the trustees for the time being should, if and when required by the directors of the society, sell the property. An order was made for the winding-up of the society, as an unregistered company, under sect. 199 of the *Companies Act*, 1862. By a subsequent order, six directors of the society were appointed liquidators, and it was ordered that all the acts required or authorized by the Act to be done by the official liquidators might be done by any two of them. By another order it was ordered (following the terms of sect. 203 of the Act), that all such property real and personal, including all interest, claims and rights in, to and out of property real and personal, and including things in action, as might belong to or be vested in the society, or to or in any person or persons in trust for or on behalf of the society, should vest in the official liquidators, and (in pursuance of sect. 96) that they should be at liberty to exercise any of the powers conferred on them by sect. 95 of the Act without the sanction or intervention of the Court. After this, two of the six liquidators, without any further sanction of the Court, sold the mortgaged property, and executed a deed by which they purported to convey it to the purchaser in fee, freed and discharged from the mortgage debt:—

Held, by *North*, J., that the trust for sale was validly exercised, and the legal estate in the property effectually conveyed to the purchaser:

Held, on appeal, by Lord *Esher*, M.R., and *Cotton*, L.J. (*dubitante Fry*, L.J.), that the power of sale was validly exercised;

But *held*, by *Cotton*, and *Fry*, LJJ. (*dissentiente* Lord *Esher*, M.R.), that the conveyance only passed the legal estate in two-sixths of the property.

SUMMONS under the *Vendor and Purchaser Act*, 1874, by *Tidy*, the purchaser of real estate under a contract dated the 9th of August, 1888, claiming a declaration that the vendor had not delivered a perfect abstract of his title, nor made out a good title to the property comprised in the agreement, and an order

for the return of the deposit paid by the purchaser, with interest and costs.

F. H. Ebsworth, the vendor, was the trustee in the bankruptcy of *Joseph Thorp*, whose wife had died in 1886, shortly after the bankruptcy, seised in fee of certain messuages at *Norwood*, subject to a mortgage for £650. *Joseph Thorp* was tenant by the curtesy, and the subject-matter of the present sale was a policy for £3000, which the vendor had in 1888 effected on the life of *Joseph Thorp*, and *Joseph Thorp's* life estate in the houses as tenant by the curtesy.

The property sold consisted in part of a house and premises called *Sussex House*. The abstract of title delivered by the vendor to the purchaser shewed that the land on which this house stood was subject to a covenant that no public-house or beershop should be erected thereon, and that no detached building of less cost than £300, or semi-detached building of less cost than £250, except stabling to be used therewith, should be erected thereon. The contract for sale to the present purchaser contained no reference to this covenant, but it stated that the house was subject to a lease for twenty-one years from Lady Day, 1884, determinable at the end of seven or fourteen years, at the option of either party, at the yearly rent of £75 for the first seven years, and of £80 for the remainder of the term. The purchaser required that the vendor should shew that this restrictive covenant did not bind the purchaser.

The abstract also shewed that by an indenture of mortgage, dated the 4th of June, 1866, and made between *T. R. Meakin* of the one part, and *T. T. Lewis* and *G. Whiffin*, described as trustees of the *Economic Benefit Building Society* (of which society the mortgagor was a member), of the other part, in consideration of £300 paid to him by the trustees out of the funds of the society, the mortgagor granted the property to the trustees in fee, subject to a proviso for vacating the security on due payment of certain instalments under the rules of the society. And it was provided that, if the mortgagor should neglect for three successive monthly meetings of the society to pay all or any of the subscriptions, or should neglect to observe any of the regulations of the society, or to perform any of the covenants

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on his part contained therein, the property should be held upon trust that the trustees for the time being of the society should, if and when required by the directors of the society, sell the property without the concurrence of the mortgagor. And it was declared that the purchase-money to be received should be applied in manner prescribed by the rules for the time being of the society, and that the receipts of the trustees for the time being of the society should be sufficient discharges.

The next deed abstracted was a conveyance dated the 9th of May, 1877, made between *Henry Hodges* and *John Toner* (described as two of the official liquidators of the *Economic Benefit Building Society*) of the one part, and *Edmund Graves* of the other part. The abstract stated the recitals in this deed to the following effect: that default was made by *Meakin* in payment of the subscriptions, and the sum of £300 still remained due to the society, together with an arrear of interest thereon; that by an order dated the 16th of November, 1872, it was ordered that the society should be wound up; that by an order dated the 16th of December, 1872, *John Boyd, G. F. Anderson, William Boyd,* the said *H. Hodges, J. T. A. Patrick,* and the said *J. Toner* were appointed official liquidators of the society, and it was ordered that all the acts required or authorized by the statutes to be done by the official liquidators might be done by any of the said official liquidators; and that by an order dated the 13th of January, 1873, it was ordered that all such property, real and personal, including all interest, claims, and rights in, to, and out of property real and personal, and including things in action, as might belong to or be vested in the society, or to or in any person or persons in trust for or on behalf of the society, should vest in the official liquidators of the society. By this deed, in consideration of £280 paid by *Graves* to the said liquidators, the said liquidators, and each of them, granted the property to *Graves* in fee, freed and discharged from the £300 and all interest and all other moneys intended to be secured by the mortgage of the 4th of June, 1866. The abstract then shewed that by the will of *Graves,* who died in February, 1883, the property was devised to Mrs. *Thorp* in fee.

None of the above-mentioned three orders made in the winding-

up of the *Economic Society* was abstracted in chief, but their effect appeared only by the recitals in the deed of the 9th of May, 1877.

The purchaser made (*inter alia*) the following requisitions:—

"The power of sale conferred by the mortgage of the 4th of June, 1866, is exercisable only by the trustees of the society, by direction of the directors. What authority had the liquidators to exercise the power as against the mortgagor? The orders recited in the conveyance of the 9th of January, 1877, should be abstracted in chief and produced. By virtue of the order of the 13th of January, 1873, the property (it is assumed) vested in all the liquidators. How could two of them convey? The order of the 16th of December, 1872, does not authorize a conveyance by two of them." The purchaser also objected that there was nothing to shew that the sale by the liquidators had been sanctioned by the Court. To these requisitions the vendor's solicitors replied that the orders gave the liquidators power to sell; that the vendor had not the originals or copies of the orders, but could obtain office copies at the purchaser's expense; and they insisted that the order of the 16th of December authorized the conveyance to be made by two of the official liquidators.

On the hearing of the summons, office copies of the three orders were produced by the vendor, and it then appeared that the six liquidators had been directors of the society, and that the order of the 16th of December, 1872, which appointed them contained the following clause: "The Judge doth declare that all the acts required or authorized by the above statutes to be done by the official liquidators may be done by any two of the said official liquidators." It also appeared that the order of the 13th of January, 1873, contained (in addition to what appeared from the recital in the abstract) the following clause: "And it is ordered that the said official liquidators be at liberty to exercise any of the powers conferred on them by the 95th section of the *Companies Act*, 1862, without the sanction or intervention of the Court, in pursuance of the 96th section of the said Act."

Another requisition made by the purchaser arose thus: the title was traced through the will of one *George Holmden*, who had been a mortgagee of the property. This will was not

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abstracted in chief, but the abstract shewed that a deed dated the 27th of January, 1868, by which the executors of *Holmden* had conveyed the property, contained a recital that *Holmden*, by his will, dated the 8th of June, 1867, gave all his personal estate to his executors, upon trust as in the will mentioned, and devised all the freehold and copyhold hereditaments vested in him upon trust or mortgage, to his executors in fee, subject to the trusts and equities of redemption affecting the same. The purchaser required that this will should be abstracted in chief. The vendor's solicitors replied, "We have no copy, and an abstract would only give the part recited in the deed. The will can be seen at *Somerset House*."

Another requisition was, "It should be shewn that all tithe is properly redeemed, or, if not redeemed, is properly apportioned." The property sold was about a quarter of an acre in extent, and it had formed part of a plot of land of about seventeen acres, which was subject to one tithe rent-charge. The vendor's solicitors replied, "We have no information as to the tithe. The property was not sold free from it."

The summons came on for hearing before Mr. Justice *North* on the 4th of March, 1889.

P. F. Wheeler (*Cozens-Hardy*, Q.C., with him), for the purchaser:—

The purchaser is entitled under his contract to the unrestricted use of the property, and he will be bound by the restrictive covenant because he has notice of it.

Everitt, Q.C., and *T. C. Wright*, for the vendor:—

The purchaser has only bought a life estate, and the house is demised for twenty-one years. The life estate is not free from impeachment for waste, and the purchaser could not therefore pull down the house. An affirmative obligation to do an act does not run with the land, nor is it enforceable against an assignee with notice: *Haywood* v. *Brunswick Permanent Benefit Building Society* (1).

(1) 8 Q. B. D. 403.

Wheeler, in reply:—

The *onus* is on the vendor to shew that the restriction will not injure the purchaser. The lease may be determined at the end of seven years. The house might be burnt down before the end of the lease, and, if there were no restrictive covenant, the purchaser would be able to come to an agreement with the person entitled in remainder after the life estate as to the user of the property.

NORTH, J. (after stating the effect of the lease and the covenant, continued):—

Buildings have since been erected on the property, and they are the subject of the lease. The present purchaser is not a purchaser of the property out and out; he is merely a purchaser of the life interest of the tenant by the curtesy. Before deciding whether a covenant is material to the enjoyment of the property, it is necessary to know something about it. I have no sufficient information to enable me to judge of it. All I know is that the bankrupt, whose interest is the subject of the sale, is tenant for life of property which is apparently now fully built upon, and I have no idea what his age is, or how long his life is likely to last. Those are matters which it is essential that I should know before I can say whether the covenant is material or not. The question is, whether the existence of the covenant can interfere with the purchaser's enjoyment of the property in the future. This is a matter of evidence, and I cannot guess at it or speculate about it. I think the *onus* is on the purchaser to shew that the covenant will interfere with his enjoyment of the property, and it has not been proved to me that it will. I must overrule the objection.

Wheeler, for the purchaser:—

The abstract was imperfect, because the three orders made in the winding-up of the *Economic Building Society* were not abstracted in chief, as they ought to have been. The recitals of the orders were incomplete. Now the orders have been produced some of the purchaser's objections have been got rid of. But the objection remains that the power of sale contained in the mortgage to

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the building society was given to the trustees, to be exercised by them if and when required by the directors, and it could not be exercised by the liquidators. The terms of such a power must be strictly followed: *Bradford* v. *Belfield* (1). Again, the legal estate in the property was vested in all the six liquidators, and two of them could not either exercise the power or convey the estate.

Everitt, Q.C., and *T. C. Wright*, for the vendor:—

The abstract was perfect, though it was not verified. It is sufficient if the date and effect of an order appears by a recital: *Oakden* v. *Pike* (2).

The order of the 13th of January, 1873, vested everything belonging to the society, including this power of sale, in the six liquidators as liquidators: *Graham* v. *Edge* (3). The order was made under the power conferred by sect. 203 of the *Companies Act*, 1862, and is expressed in the very words of that section. And sect. 199, which confers the power to wind up an unregistered company, provides that, with certain exceptions and additions, "all the provisions of this Act with respect to winding-up shall apply" to the winding-up of an unregistered company. This imports the provision of sect. 92, that, "if more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act hereby required or authorized to be done by the official liquidator is to be done by all or any one or more of such persons." The declaration, therefore, contained in the order of the 16th of December, 1872, empowered two of the liquidators to exercise the power of sale and to convey the property.

Wheeler, in reply:—

Sect. 92 refers only to purely ministerial acts; it does not enable the Court to authorize two liquidators to transfer an estate which is vested in six. And the order of the 13th of January, 1873, did not vest the power of sale in the liquidators at all. The *Companies Act*, 1862, does not enable the liquidator of a

(1) 2 Sim. 264. (2) 11 Jur. (N.S.) 666.
(3) 20 Q. B. D. 683, 688.

company to exercise a power which is vested in the company or in a trustee for the company. That Act differs in this respect from the *Bankruptcy Act*, 1883. The power of sale in this case can only be exercised by the trustees for the time being.

NORTH, J.:—

As regards the objection that the three orders made in the winding-up are not abstracted in chief, I think that technically it is a good objection. Those orders form a material part of the title, and they ought to have been abstracted in chief. It was not sufficient to abstract the deed of the 9th of May, 1877, the recitals of the orders in it obviously not giving all the information necessary. Those orders are before me, and it is clear that they contain some things the statement of which in the abstract would have prevented some of the requisitions from being made. Therefore I think the abstract is technically imperfect.

As regards the objection, that it does not appear that the sale carried out by the deed of the 9th of May, 1877, received the sanction of the Court, it was not necessary that it should receive that sanction, because the last of the three orders authorized the liquidators to act without the sanction of the Court. Then it was objected that it does not appear that any default in the payment of subscriptions had been made by the mortgagor which would justify the sale. That was a material omission, but the mortgage contains a clause relieving the purchaser from the necessity of inquiring whether such default had taken place, and, therefore, the substance of the objection is got rid of.

Then it is said that the title is defective, because the power of sale was exerciseable by the trustees of the building society, and it does not appear how the power became vested in the liquidators, nor how two liquidators were capable of transferring the legal estate which was vested in the six. If the orders had been produced, I think in all probability those objections would not have been raised. But, in my opinion, they are not sound objections, because the society, being an unregistered company, was wound up under sect. 199 and the following sections of the *Companies Act*, 1862. By sect. 199 all the provisions of the Act with respect to winding-up are, with certain exceptions and additions,

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to apply to an unregistered company. And sect. 203 provides that the Court may, by the order made for the winding-up of an unregistered company, or by any subsequent order, "direct that all such property, real and personal, including all interest, claims, and rights in, to, and out of property, real and personal, and including things in action as may belong to or be vested in the company, or to or in any person or persons on trust for or on behalf of the company or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names, and thereupon the same, or such part thereof as may be specified in the order shall vest accordingly." In the present case the Court appointed six directors of the company to be the official liquidators. It named them, that it might be known who they were, and subsequently an order was made vesting in the official liquidators all the property of the company and the rights therein. That vested in them the legal estate outstanding in the trustees of the building society. That order vested in the liquidators the right to receive the debt secured by the mortgage, and it vested in them all interest, claims, and rights in, to, and out of the property which was so vested in the trustees. The legal estate, therefore, passed to the official liquidators, not as individuals, as *Graham* v. *Edge* (1) shews very clearly, but as liquidators. Then sect. 95, which is made to apply to the liquidation of an unregistered company, provides that the official liquidator "shall have power, with the sanction of the Court, . . . to sell the real and personal . . . property . . . of the company . . . with power to transfer the whole thereof to any person or company, or to sell the same in parcels, and to do all acts, and to execute in the name and on behalf of the company all deeds, &c.;" and sect. 96 enacts that "the Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court." The second of these three orders contains this declaration: "And the judge doth declare that all the acts required or authorized by the above statutes to be done by the official liquidators may be done by any two of them." Therefore, the order of the 13th of January having vested in the liquidators all

(1) 20 Q. B. D. 683.

the property, &c., which was vested in the trustees for the building society, the Act imposed upon them the duty of realizing the property of the society, and the order of the 16th December directed that all acts required or authorized to be done by the liquidators (including, among other things, the realization of the society's property) may be done by any two of the liquidators. Then two of the persons so authorized proceeded to sell the property, and, in my opinion, that was clearly within their powers. It is said that the mortgage deed gave the power of sale to the trustees, and that they only could exercise it. But the statute has supervened, and has vested in the official liquidators all the property which the society had for the purpose of paying its creditors, and part of its property consisted of mortgages vested in the society itself or in trustees for it. Therefore, the liquidators had the property, and it was their duty to realize the society's assets, and to exercise the trust for sale contained in the mortgage deed, and, in my opinion, two of them had a right to execute all deeds or documents necessary for the purpose of transferring the legal estate in the property which was vested in the body of official liquidators. In my opinion the power to do that is expressly given by the Act. It is quite true sect. 95 does not say they may sell "and convey"—if it had there could have been no question—but I think that is implied, because it says "with power to transfer the whole thereof to any person or company, or sell the same in parcels." I think that gives them power to convey what they have power to sell. I think, therefore, that these objections are not well founded.

Wheeler, for the purchaser:—

The will of *Holmden* ought to have been abstracted in chief.

Everitt, Q.C., and *T. C. Wright*, for the vendor:—

This is a purely technical objection, for the recital gave all the necessary information as to the contents of the will. And by virtue of sub-sect. 6 of sect. 3 of the *Conveyancing Act*, 1881 the expenses of the production of the will, which is a document in the possession of the vendor, must be borne by the purchaser.

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Wheeler, in reply:—

Sub-sect. 6 does not apply to such a document: *In re Johnson & Tustin* (1); *In re Moody & Yates' Contract* (2). Those cases shew that every document which is a necessary link in the chain of title must be produced at the expense of the vendor, unless this liability is expressly excluded by condition.

[NORTH, J.:—Then you would have to insert in sub-sect. 6 the words "not forming part of the title to the property."]

NORTH, J.:—

This objection is technically right, but there is no substance in it. The abstract does contain by means of this recital a sufficient statement of the contents of the will, and, though that will is a link in the title, and ought, strictly speaking, to have been abstracted in chief, the purchaser has really got as much information as if it had been abstracted in chief. Therefore, the abstract is only technically imperfect. The importance of the matter is this. It is said that, if the will had been abstracted in chief, the cost of producing the probate or office copy to verify the abstract would have had to be borne by the vendor, and not by the purchaser. I do not think so. I think the purchaser would have had to bear that expense, and, therefore, although the abstract is technically imperfect, yet, as it contains all the information which is really required, it is sufficient and, in my opinion, the purchaser must bear the expense of verifying it. The real object is to throw that expense upon the vendor, and I hold that there is no substance in the objection.

Wheeler, for the purchaser:—

The vendor ought to procure an apportionment of the tithe at his own cost. If it is not apportioned the purchaser will be liable to pay the whole of it, and he might be distrained upon for the whole of it. He ought not to be compelled to procure an apportionment at his own expense.

[NORTH, J.:—Is there any precedent to be found for an apportionment of tithe in the case of a purchaser of a life estate?]

(1) 30 Ch. D. 42. (2) 30 Ch. D. 344, 348.

The purchaser of a life estate ought not to be in a worse position than the purchaser of a fee.

Everitt, Q.C., and *T. C. Wright*, for the vendor:—

The only authority at all bearing on the point is a statement in *Dart* on Vendors and Purchaser (1) that "when there has been an apportionment, the contract or conditions should state either the fact or the amount actually payable."

[They were stopped by the Court.]

NORTH, J.:—

The proposition is, that the purchaser of land is entitled to call upon the vendor to apportion the tithes, in case one tithe is payable in respect of that land together with other land, but no authority has been produced for that proposition. I asked for some authority—even a passage from a text-book—to shew that the purchaser of a life estate from the trustee in bankruptcy of the tenant for life can call upon the trustee to make such an apportionment, but no such authority has been produced. In my opinion it is not the duty of a trustee in bankruptcy to procure this apportionment before he transfers the property to the purchaser. In the absence of any authority I think the objection is unfounded.

W. L. C.

C. A.

The purchaser appealed from the decision that a good title had been shewn.

The appeal was heard on the 24th of May, 1889.

Cozens-Hardy, Q.C., and *P. F. Wheeler*, for the appeal:—

The existence of a restrictive covenant makes the property of less value, and is a fatal objection to the title if it has not been disclosed: *In re Higgins and Hitchman's Contract* (2). This will hardly be disputed in the case of the purchase of a fee, but the same principle must apply to a purchase of a life estate; the purchaser gets a life interest in a property which is of less value than what he bargained for. In the present state of the law a tenant for life can sell the fee, so he is clearly damnified by the

(1) 6th Ed. p. 400. (2) 21 Ch. D. 95.

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estate being of less value, though his enjoyment of the life estate may not be interfered with.

Then we say that the power of sale in the mortgage was exerciseable only by the trustees of the society, and that the liquidators could not sell. The power of sale is of an unusually limited description; it could not be exercised by a transferee. The equity of redemption is not part of the property of the company, and there is no ground for holding that a sale which will bar the equity of redemption can be made by any persons except those authorized by the mortgage deed.

[COTTON, L.J.:—Could the company exercise the power after the winding-up order?]

Perhaps not; but if not then we have in substance a mortgage with no power of sale. Then we contend that even if two liquidators could sell, they could not pass the legal estate which, under the order of the 13th of January, 1873, was vested in all the six.

Then we say that the vendors were bound to get the tithe rent-charge apportioned. There is no authority on the point, but it is the universal practice of conveyancers to insert in conditions of sale a condition that the vendors shall not be bound to get the tithe rent-charge apportioned, which shews the understanding of the profession to be that in the absence of condition the vendors must procure an apportionment: *Jarm.* and *Byth.* Conv.; *Davidson's* Precedents (1); *Crabb's* Precedents.

Everitt, Q.C., and *T. C. Wright*, for the vendor:—

As regards the restrictive covenant the purchaser bought a life estate with a policy of assurance, and his enjoyment of the property is not interfered with by the covenant. It cannot be supposed that when he bought his life estate he had in his mind the thought of pulling down the buildings and altering the property.

[LORD ESHER, M.R.:—He says he may want to sell.]

He cannot sell under the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38).

(1) 4th Ed. vol. i. p. 689.

[FRY, L.J.:—He could apply to the Court under the *Settled Estates Act*, 1877 (40 & 41 Vict. c. 18).]

His right under that Act is very shadowy, for he could hardly obtain a sale if any remainderman objected.

[FRY, L.J.:—Suppose this land became valuable for building purposes, an application for a sale would in all probability be granted.]

This cannot be supposed to have been within the contemplation of the parties.

Then as to the sale by the liquidators. The power of sale is not in the form of a power, but is a trust to be exercised on the requisition of the directors, by the trustees or trustee for the time being. The trustees had no longer, after the winding-up order, any legal estate which they could convey; and trustees or trustee for the time being must be construed as applying to the persons who for the time being had power to convey and to give receipts.

[FRY, L.J.:—How do you get the power of making the requisition transferred from the directors to the liquidators?]

The words of sect. 203, "all interest, claims, and rights in, to and out of property," are sufficient to include it. The power of making the requisition is vested in the directors for the benefit of the company, and is a right in respect of property. By sect. 204 the powers of this part of the Act are additional to the powers given by the former part of the Act to liquidators on a winding-up by the Court; and those powers under sect. 95 are extensive. The requisition of the directors is required because they are the persons whose duty it is to look to the interests of the company. The right is given to them for the benefit of the company, not for the protection of the mortgagor, and it comes under the head of rights vested in persons in trust for the company. *Hind* v. *Poole* (1) furnishes an analogy. If the concurrence of the directors was required for the purpose of realizing assets, they would for this purpose continue to be directors after a winding-up order. If the directors could have concurred the purchaser was safe, for the mortgage deed exonerates him from

(1) 1 K. & J. 383.

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seeing to their having made a requisition. Then, moreover, the sale was completed more than twelve years ago, so the equity of redemption, if not barred at the time, is now barred by the *Statute of Limitations.*

Then as to the conveyance of the legal estate. It was vested in the liquidators not as individuals but as officers: *Graham* v. *Edge* (1); and under sect. 92 the Court has power to direct that two may act.

[COTTON, L.J.:—Does that authorize the Court to enable two of them to convey property vested in the six?]

We submit that it does—that it enables the Court to empower a part of the body to do anything which must otherwise be done by the whole. In *In re Metropolitan Bank and Jones* (2) it was not doubted that if the Act had empowered one liquidator to affix the seal of the company the surviving liquidator could have done it. The *Charitable Trusts Act,* 1860 (23 & 24 Vict. c. 136), sect. 16, gives a similar power. Sect. 95 empowers the liquidator to do all things necessary for winding-up the affairs of the company, and the conveyance to a purchaser is one of those things.

[As to the tithe apportionment they were stopped by the Court.]

Cozens-Hardy, in reply:—

The clause under which two of the six may act occurs in that part of the Act which relates to the winding-up of registered companies, where the question as to conveying merely depends on the right to affix the corporate seal, and the Court cannot import from it a power to two to convey an estate which is vested in the six.

The Respondent really does not deal with the point as to sale under the *Settled Estates Act,* and there might also be a sale with the concurrence of the remaindermen. The observations of V.-C. *Hall* in *In re Higgins and Hitchman's Contract* (3) apply to the present case.

As to the power of sale, such a power cannot be exercised by an assign unless it is in terms made exercisable by him: *Brad-*

(1) 20 Q. B. D. 538, 683. (2) 2 Ch. D. 366.
(3) 21 Ch. D. 95.

ford v. *Belfield* (1). The requisition of the directors is made necessary for the protection of the mortgagor as a member of the society.

[LORD ESHER, M.R.:—I doubt that. Would it not be the duty of the directors to act in every fair way against the mortgagor if the money required raising?]

A power given to officers of a society, being persons in whom the mortgagor had confidence, cannot be exercised by strangers.

As to the conveyance of the legal estate by two liquidators, the *Charitable Trusts Act*, 1860, is rather in our favour, for it shews that the legislature thought it desirable to use very clear and special language to give such a power as is now contended for.

LORD ESHER, M.R.:—

In this case three objections are taken, and I will deal with them in the order in which they have been taken.

First, with regard to the restrictive covenants. The restrictive covenants are that no public-house shall be built upon this piece of land, and that no houses shall be built below a certain value. No information was given of the existence of the restrictive covenants at the time of the purchase, and the objection, if it is an objection, arose when the title had to be made out. Then the question is whether the covenants are real injuries to the title. Mr. Justice *North* held that they were not. If it had not been for the *Settled Estates Act* I should have thought that the objection taken to the title by this person who contracted to buy the life estate, and who, therefore, would only be entitled to have the property for the life of another person, that he could not put a public-house on this plot of ground, or that he could not build on that plot of ground houses worth less than £300 each, would have been utterly frivolous. What would have been the state of things as to a public-house? He must either turn the building on that plot of ground into a public-house, which would involve the suggestion that he was to turn the stables or two of the cottages into a public-house (both of which ideas are to my mind

(1) 2 Sim. 264.

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simply ridiculous), or he might build a public-house on the space which is in the middle of the existing buildings. Can it be imagined that a man will build a house of such a description as the magistrates would license on land which might pass from him next week by the death of the tenant for life? Such things may be suggested in Court, but in a business point of view they are idle and frivolous, and I should have treated them with contempt, and said they were mere shadows. I cannot think that such mere shadowy objections, on which no man would ever act, and which can only be suggested by the ingenuity of counsel at the bar, could ever be admitted by the Court. But then comes this *Settled Estates Act*, to which we are bound to attend as long as it remains in force.

The point taken is this. It is said that the purchaser being the tenant during the life of another man, can get an order from the Court to sell the fee. I do not say that he cannot. He may under the *Settled Estates Act* get an order enabling him to sell the fee. If he obtained such an order, then if there had been no restrictive covenants he might sell the property to a person who might then pull down the existing buildings and build a public-house. Then can I say that he would not have sold it for more than he could get for it when subject to these covenants. I suppose he would. Therefore, in consequence of the *Settled Estates Act*, I think it has become material that he should know whether there was, on this property, such a restrictive covenant as this, and as this restrictive covenant was not made known to him, and as it would have an effect on his rights, then I think this is an objection to the title; and I am sorry to say that I think this objection a valid one. As I say, I am sorry, because I do not believe it is a real and honest objection. It is one of those objections to which the Court is bound to give effect though not taken really and honestly because the purchaser feels it to be an objection, but because he is tired of his bargain, and some one has found out this objection to enable him to get rid of it. That, however, is not my business, the objection is a valid one and is enough to determine the case.

But another point, of decidedly more importance, has been argued out, and therefore, it is right, or, at all events, it is not

wrong, that we should give our opinion upon it. The only objection that I see to giving our opinion upon it is this, that if we happen to be wrong, or if the majority of us happen to be wrong, the parties in this particular case practically cannot appeal to the House of Lords, if we are right on the first objection.

The second point arises with regard to the mortgage. There was an unincorporated company, or an unregistered company, which carried on its business principally by means of lending money on mortgage of houses which people were about to build. They were a company acting by their directors; and, inasmuch as they were not an incorporated company, all their property was held by trustees, whose trust is regulated by their articles of association. The trustees were, to my mind, mere names, except for the purpose of seeing that the money was kept safely in its proper place, and that was, to my mind, their only power. They were bound to keep the money, as it was invested in their names, and not to deal with it except according to the directions of their *cestuis que trust*; their *cestuis que trust* being the company. But they had undertaken this trust for a company, association, or body, knowing that the business of the company, association, or body was to be carried on according to the agreement between all the parties, and according to that agreement it was to be carried on by the directors. Then what the trustees had undertaken to do, as it seems to me, was to obey the directions given to them by the directors of the company, properly come to. If a resolution of the directors, properly arrived at, directed them to do anything with the property standing in their names, they were bound to do it. Unless they got such directions from the directors, upon a proper resolution, they would be guilty of a breach of trust if they did anything with the property. That was the position of the trustees. The position of the directors was, that they were the servants of the association which appointed them.

Now one principal part of the business of such a company as this is to advance money for the building of houses. They advance the money upon the terms that the houses, when built, shall be mortgaged to them. They cannot be mortgaged to the association, because it is not an incorporated company, and there-

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fore their mortgages must be made in some such form as the mortgage in the present case. The mortgagors borrow money from the company, and involve themselves into all the intricacies which have so frequently been before the Courts of late years. They not only have to pay back the mortgage money, and ordinary interest on such a mortgage, but they have to pay subscriptions, fines, and all other sums which by the rules of the society they are liable to pay; and there is always a provision in the mortgages that, if they fail in paying any one of these things, then they must pay the whole mortgage money, or that the house, which they have themselves built with the money borrowed from the society, is either forfeited, or taken from them and sold by the company.

In the present case we have to deal with a provision as to sale, and that provision, as against the mortgagor, must be exercised on behalf of the association, who are really the mortgagees. How must the power be exercised? The association cannot meet at a general meeting, at which every member of the association is present, in order to deal with the particular mortgage, or with the particular power of selling the property of one of the mortgagors; therefore it must be done, on behalf of the association, by the directors, who are the servants of the association. It is said that the directors have a duty cast upon them of protecting the mortgagor; but the only ground on which that is supported is that the mortgagor, being a member of the association, has a part in the election of the directors. That is true, but does it follow from that that they are bound to protect him? I protest most strongly against such a view; not only are they not bound to protect him, but they are bound not to protect him. They are bound, if he makes any default, to act for the association, whose servants they are, and they are bound to look only to the advantage and interests of the association as between the mortgagor and the association; and they are bound, if it is necessary for the protection of the association, to take every point against the mortgagor. Of course, they are bound, as honest men, not to do anything against him which an honest adversary would not do; that is to say, they must not deceive him by misrepresentation, or do anything else which is unfair. That is all the duty

they owe to the mortgagor, and it is the same duty that they owe to anybody else. Under such a mortgage, they are acting solely for the association.

Now, if there were no Act of Parliament in the case, what would have to be done? The directions to be given to the trustees must, beyond all doubt, be given by the directors; but the direction is to be given to the trustees, and it is to be given by the directors for the time being, and only by them. But what was done here was not done by them. We must see, then, whether the *Companies Act*, 1862, has substituted anybody for them.

If a registered company goes into liquidation the Court has power to appoint an official liquidator; and if it does so, what is the position of the persons who were the directors? To my mind they have ceased to exist. The official liquidator is put in their place, and is empowered to do everything which the directors might have done before. What, then, could the official liquidator have done under the mortgage? It seems to me that he could have done, under the mortgage, all that the directors were to do under it as between the mortgagor and the association, what, before the winding-up, the association could only do by its directors. It follows, therefore, to my mind, that the official liquidator could have sold this property upon the default of the mortgagor, and could have undertaken to convey it. But it is said that the official liquidator could not have conveyed it. In the case of a registered company the official liquidator could have taken the seal of the company out of the hands of anybody who had it, and he could have put it on the deed of conveyance. It seems to me that the difference between that and conveying is of the most shadowy kind, and that substantially the official liquidator has the power to sell and convey, and that the Act of Parliament meant that he should have it.

We then come to the case of an unregistered company. The Court is empowered to direct that all property, whether real or personal, of the association is to vest in the official liquidator. Therefore, so far as a mortgage is property, it is to vest in the official liquidator. But it was said that something more was to vest in the official liquidator, "property, real and personal,

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including all interest, claims, and rights in, to, and out of property, real and personal," and it was suggested that the right to convey is a right which is included in the word "right," or in the word "interest." I do not think that those words include things to be done, but only things which are of the same kind as property, or an interest in property, because at the end of the section there is a provision that they are in their official names to bring or to defend any action, suit, or other legal proceeding relating to any property vested in them or any other suits and actions necessary to be brought or defended for the purpose of effectually winding up the company. There is, then, no power given in that part of the section for them to do such acts as it is now said they may do, but they can only insist on the rights in respect of the property which is given to them. But there is a power in the Court when the association is to be wound up to vest the property or any interest or rights in the nature of property in the official liquidator or official liquidators. That has been done here, and it has been done by vesting the property of the association in the six official liquidators: it does not vest it in them personally, the case which has been cited of *Graham* v. *Edge* (1) shews that distinctly, and I venture to think that that case was rightly decided, and shews that whatever is vested in the official liquidators is only vested in them as official liquidators.

The property of the association, then, became vested in the six official liquidators as such. What is the consequence of that? The consequence is that by sect. 95 the official liquidator has power "to sell the real and personal and heritable and moveable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels," and "to do all acts, and to execute, in the name and on behalf of the company all deeds," and so on. That, no doubt, is with regard to an incorporated company. But sects. 203 and 204 give to the official liquidators in the case of an unregistered company all the powers of the official liquidator in a registered company, which are applicable to the case of an unregistered company.

(1) 20 Q. B. D. 538.

Then, if that is so, I think that the 95th section, applied to them, gives them power to sell and to transfer all the property which is transferred to them by an order under the 203rd section. Now I take it that a mortgage made to a trustee for the association is the property of the association, and, therefore, the official liquidators have the right to transfer anything vested in them with regard to that property. The mortgaged property was held by the trustees for the association subject to an equity of redemption, and subject to the directions of the directors. Now the official liquidators are put into the place of the trustees, but they are also, as it seems to me, put into the place of the directors, and, therefore, they have the powers both of the trustees and of the directors. They have, then, the power to sell the property and to transfer it. If they have the power to sell it, I think to say that they have the power to sell it but not the power to transfer and convey it, is to introduce the most shadowy distinction that can be made, and I cannot believe that the Legislature intended that they should have power to sell but not have power to convey. The whole six of the official liquidators could convey, because they could direct themselves to convey. Now what is the difference between directing themselves to convey and conveying? The whole six would as directors have directed the whole six as trustees to convey, and would have directed the whole six to put their names and seals to the document of conveyance—that is, to convey. Now, by the 92nd section power is given to the Court to appoint more official liquidators than one, and it says that "If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act hereby required or authorized to be done" (among which acts is the power given under sect. 95 to sell and convey) "by the official liquidator is to be done by all or any one or more of such persons." In the present case the Court made an order that all that the six official liquidators could do might be done by any two of them. In my opinion it would be making the Act of Parliament next door to ridiculous to say that two of them may do all that the six may do except to sign and seal a paper or parchment on behalf of all. That is the merest form that can be, and, in my opinion, the true meaning of the Act of Parliament is

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this, that the Court may appoint six official liquidators, but may modify that order by an order made at the same time, or made subsequently, and say, although we have nominated six official liquidators, any two of them may do anything which the six could do. See what the effect of the contrary view would be. Supposing that any one of the six happens to be out of the way, if you hold the concurrence of all six to be necessary, the Court has created a difficulty which can hardly be got over. I do not think the Court can say that only two who are named by it are to do what the six may do; but it may make an order that any two may do it, and if so, any two who are in the way may do it.

That being so, I think that by the Act the two had power to sell and convey, and I agree with Mr. Justice *North* that this objection to the title is untenable.

The third point, that about the apportionment of the tithe rent-charge is, I think, frivolous. It is impossible to my mind to hold that if a person sells a field which is subject to a tithe rent-charge extending over properties belonging to other people, the vendor of that one field is to pay the costs of summoning all the other landowners (who in this case are said to be 105 in number) before the magistrate, in order to get an order for apportionment. In such a case no sane person would ever undertake to get such an apportionment, and if the vendor is not to pay for it, it is not, as was argued, the vendee who will have to pay for it. He never will think of getting the apportionment at all. In my opinion this is a shadowy idle objection taken for the purpose of getting rid of a contract which for other reasons the purchaser is unwilling to perform.

I am sorry to say that I think the first objection is a good one. I think the second objection was not a good one, although it is formidable, and although it is of great general importance. I agree with the learned Judge as to that, and as to the reasons which he has given for it. As to the third objection, I take it to be no objection at all. As however the first objection is good the decision appealed from must be reversed. I do not think that the point about the *Settled Estates Act* was brought before the learned Judge in the Court below, and therefore I do not think that we are overruling his opinion on the first objection.

COTTON, L.J.:—

The first point which I will deal with, and which is an important one, is as to the restrictive covenants.

As I understand the law on the subject it is this, that where a man contracts to sell land, unless he puts a notice in the contract for sale that the land is subject to certain restrictive covenants, he is bound to perform his contract by making a transfer of the land free from restrictions which can in any way substantially affect the land. I put the proposition in that way, following what was said in *In re Higgins & Hitchman's Contract* (1), that where it was practically impossible that gasworks should be erected a covenant not to erect them might be disregarded.

Now, to my mind, it is impossible to say that the restrictive covenants in the present case are to be disregarded as being necessarily inoperative. Here is land near a railway station in a neighbourhood which may very much change in its character, which may improve or may be depreciated, and it may become very important to deal with the land in a way which would be prohibited by these covenants. Then it is said what was sold was only a life estate, and it is suggested that the effect of the restrictive covenants was really to increase the value of the land by improving the neighbourhood. To my mind that is a mistake. We have not to consider whether the covenants improve the neighbourhood, but whether they increase the value of the land. I cannot come to the conclusion that they do, because, as I pointed out, circumstances may arise when these restrictions might be injurious to the owner of the land. As to his being only tenant for life, I do not say what would be the result if the tenant for life had not the power to come to the Court under the *Settled Estates Act*, but he has that power, and that being so, why are we to say that the vendor can evade the general rule of law which I have stated? The Court could enable the tenant for life to sell the fee simple, and in such a sale these covenants cannot be disregarded, for they would diminish the price. It is not disputed that if the vendor were seised in fee simple this would be a blot on the title, which would prevent him from enforcing his contract for sale. In my opinion, the

(1) 21 Ch. D. 95, 97.

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existence of these covenants is a fatal objection to the specific performance of this contract.

Then comes the second point, which I think one of considerable importance. Has there been a conveyance which has conveyed the legal estate in this plot of land, or are there four sixths of the legal estate still outstanding?

The circumstances are these. This property was mortgaged to trustees for an association. It was an unregistered company, and an order for winding it up was made under the *Companies Act*, 1862, s. 199. In December, 1872, the Judge made an order appointing six persons official liquidators, with a direction that all the acts required or authorized by the statutes to be done by the official liquidators might be done by any two of them. Then in January, 1873, an order was made under sect. 203 of the Act vesting in the six as official liquidators all such property, real and personal, including all interest, claims, and rights in, to and out of property real and personal, and including things in action, as might belong to or be vested in the society, or to or in any person or persons on trust for or on behalf of the society. That in my opinion vested the legal estate of that mortgaged property in the six official liquidators. It is true that it was to vest in them by their official names, but there is nowhere in the Act any incorporation of the official liquidators. The property is vested in them by their official names so that they could not be subject to any action which involves personal liability. Any action which could be brought against them must be brought against them as representing the company, and must lead to such a judgment as could be performed by them out of the assets of the company. That is all that the direction that it shall vest in them by their official names really comes to.

Then it is said that the order empowering any two to do any act which could be done by the six official liquidators enables two official liquidators to convey the whole legal estate. But Acts of Parliament at present do not, and I certainly do not, regard the passing the legal estate as being a mere matter of form, as I am afraid the Master of the Rolls is inclined to do. It has been considered necessary to have Trustee Acts to enable the legal estate to be got in where a conveyance of it cannot be

obtained. In the Act referred to by Mr. *Wright*, the *Charitable Trusts Act*, 1860, the Legislature thought it necessary to use very precise terms to enable a specified majority of charitable trustees to transfer the legal estate vested in all the trustees, and, if there was here anything which amounted to a declaration by Parliament that these two could transfer the legal estate vested in the six, of course it would be our duty to act on that declaration of the intention of the Legislature. But how does the matter stand? It must be remembered that the power to authorize two to do what otherwise could only be done by six is conferred by sect. 92, contained in Part IV. of the Act, which refers to registered companies, and in my opinion was not intended, and could not be intended, to deal with the legal estate vested in liquidators under Part VIII. of the Act. Under Part IV. relating to registered companies, no legal estate is vested in the liquidators but the legal estate remains in the company. When there is a conveyance under Part IV. of the Act of land which is vested in the company, then under the authority of Parliament the liquidators, or, if a declaration to that effect has been made under sect. 92, any one or more of them may affix the seal of the company, and so transfer by the conveyance of the company the legal estate which is vested in the company and not in the liquidators. Again, supposing the legal estate is vested in a trustee for the company, the official liquidators cannot transfer that legal estate. They may no doubt call upon the trustee to transfer it according to their direction, and if he will not do so proceedings may be taken against him to compel him, or an order may be obtained under the *Trustee Act* for transferring the legal estate. It is argued that, because sect. 95, which is the section referring to registered companies, says that the liquidator is to do all that is necessary in order to wind up the company, he is enabled to vest the legal estate by his act when that legal estate is not and never has been vested in him. In my opinion it would be wrong to give to the order which says that the two may do any act which the six could do, the effect of enabling these two to transfer not only such legal estate as is vested in them, but also the legal estate which is vested in the other four. It may be inconvenient sometimes to have so many liquidators appointed, but in making the

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appointment the evil as well as the good must be borne in mind. In my opinion the objection that the legal estate in four sixths of the property is outstanding is a good objection to the title.

Then there is another point arising at the same stage of the title, the question as to the exercise of the power of sale in the mortgage. Supposing there is no power authorizing a mortgagee to sell he can only transfer a mortgage title, and any one who purchases from him takes the land subject to the right of redemption. Therefore it is a serious question whether the power of sale or trust for sale in the mortgage enabled the liquidators or any two of them to sell. I think that the order gave to the two power to enter into any contract which the six might have entered into, though not to transfer any legal estate vested in the six. The question, then, is whether the liquidators could exercise the power of sale. I think that the effect of the power of sale was to give to the trustees in whom the estate was vested power to convey to a purchaser when required by the directors who had the control of the money affairs of the association, and that when a winding-up order was made, the liquidators, being the persons having the control of the money affairs of the association, could, with the concurrence of the persons having the legal estate, make an effectual sale which would give to the purchaser a title free from all right of redemption. I think, therefore, that apart from the question as to the legal estate being outstanding the sale was effectual. I have thought it right to express my opinion on this point although, as I have said, the objection as to the legal estate is fatal.

Then, as to the tithe rent-charge, I give no opinion how the case stands when a person entitled to a property which is subject to one entire tithe rent-charge sells the property in lots. It may well be that, unless he guards himself by a stipulation, he must take upon himself the duty and expense of apportioning the rent-charge as between the different sections of his estate. But there is no authority produced, and no practice proved, to shew that where a person sells a property, which, along with property belonging to other persons is subject to a tithe rent-charge, he, in the absence of any stipulation, can be required to bear the expense of apportioning the rent-charge between his property

and the other property subject to it. In my opinion that objection fails, but as there is at least one good objection to the title, the judgment of the Court below must be reversed, and we must give our opinion that a good title has not been shewn.

Fry, L.J.:—

In this case four objections have been taken to the title. The first is as to the restrictive covenants which affect the property.

It appears to me that as a general rule it is the duty of a vendor to disclose every restrictive covenant which affects the property to any substantial extent, and that the burden of shewing that a restrictive covenant affecting the property does not do so substantially rests on the vendor. In the present case it appears to me that the restrictive covenant is not of so immaterial a description as the Master of the Rolls thinks. The erection of an outbuilding costing less than £300 seems to me to be a thing which the possessor of this property might very likely be anxious to do, and that he is prohibited from doing. Even if the tenant for life had not the power to apply to the Court for a sale of the fee, I am far from clear that the objection taken on the ground of this restrictive covenant ought not to prevail, because it must be borne in mind that with regard to the commission of waste all that the tenant for life would require to obtain, independently of these restrictive covenants, would be the consent of the remainderman. But now, before he can pull down the buildings and erect fresh ones, he must obtain the consent of the persons entitled to the benefit of these restrictive covenants. It seems to me that the covenants would be under any circumstance a not immaterial burthen on the land. But the tenant *pur autre vie* may apply under the *Settled Estates Act*, and probably obtain an order for the sale of the property. I cannot doubt that in the market the sale of this property would be weighted, as against similar property, by the fact of the existence of these restrictive covenants. It would be less desirable to a purchaser, competition would be less keen, and the price accordingly would be less. I think, therefore, there is a valid objection to be found in these restrictive covenants.

With regard to the question of whether the entire legal estate

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has passed in the circumstances which arise in this case, I agree with the view taken by Lord Justice *Cotton*. I first inquire what are the powers of the official liquidator or any one or more of the official liquidators acting in the case of an incorporated company. It appears to me to be plain, that neither the liquidator nor all the liquidators, nor any one or more of them declared under sect. 92 to have the same power as the whole body of liquidators, would have the power to divest the legal estate of real property out of any persons in whom it was vested. Supposing it were vested in the company, they plainly have no power by their own conveyance to divest the estate and to convey it. They, no doubt, may sell it in the name and on behalf of the company, and when they so do and apply the seal of the company to a deed made in the name of the company then the company is deemed to have conveyed the legal estate. Again, supposing the legal estate to be outstanding in a third person in trust for the company, it appears to me to be plain that the powers of the liquidators would not enable them to divest it out of that third person and to convey it. It is quite true that they are clothed by the 95th section with power to convey the whole of the property of the company, but that means property vested in the company. A power to transfer clearly means (unless the Legislature has given it a wider meaning) a power to transfer that which is vested in the persons who transfer, to make over that which they have and not that which they have not, to make over that which is vested in them and not that which is vested in somebody else: and the whole structure of this clause, especially the provisions with regard to the setting of the seal of the company, and as to the name of the company, clearly shew, in my opinion, that this is the meaning of the power of transfer given by that section.

Then, when that section is applied to the case of an unregistered and unincorporated company, where the vesting order has been made and the property of the company has been vested in six persons as liquidators, and two of them are authorized to act and to do all things which the six could do, it appears to me to be plain that the two have no power to divest the estate out of the remaining four. As I have already said, in the case

of an incorporated company there is no power of divesting in the liquidators, so I think in like manner in the case of an unincorporated company there is no power in any of the liquidators to divest the property out of the others. No doubt it may be said that the point is a small one, but, at the same time, the possession of the legal estate is a matter of serious importance, and it is impossible for us in the administration of the law of real property as it exists at the present time to disregard it.

The third point which arises is this, how far the exercise of the power of sale by the liquidators has excluded the equity of redemption, which can only be shut out by the valid exercise of the power of sale or by foreclosure, or by redemption proceedings. On that point I shall not express any concluded opinion. I will only say that, as at present advised, I am not clear that the power was so exercised as to have that effect.

With regard to the fourth and last point, viz., as to the tithe rent-charge, I think it is plain that there is no obligation on the vendor to apportion this charge. It must be borne in mind that this is a statutory charge to which all tithable land is presumed to be subject, and it appears to me there is no right on the part of the purchaser of part of the property to insist that the vendor shall obtain an apportionment of the statutory charge with respect to that part of the property.

The result is, that in my opinion, the judgment of the learned Judge ought to be reversed, and that in lieu thereof we must declare that *Ebsworth* has not made out a good title.

An order was made, as in *In re Hargreaves and Thompson's Contract* (1), declaring that the vendor had not made a good title, and directing him to return the deposit with interest at £4 per cent. per annum from the day when it was paid, and to pay the purchaser's costs of investigating the title and the costs of the proceedings both in the Court below and in the Court of Appeal.

Solicitor for Purchaser: *Edmund Dean.*

Solicitors for Vendor: *Terrell, Atkinson, & Winstanley.*

(1) 32 Ch. D. 454.

H. C. J.

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June 1.

NASH v. ALLEN.

[1885 N. 2.]

Will—Construction—Executory Trust for Settlement on Daughter, her Husband and Children—Gift over shewing Intention to include Children of Future Marriage—Second Husband held entitled to Life Interest.

A testator bequeathed his personal estate upon trusts for his children equally, and directed that in case his daughter, *M. A.*, or any future-born daughter, should marry during minority with, or after majority without, such consent as therein mentioned, the share of such daughter or daughters so marrying should be assigned to trustees in settlement "upon such respective marriages" for the benefit of such daughter or daughters so marrying for life, "and after her or their deceases for the use of her or their intended husband or husbands for his or their life or lives, and after their decease respectively," for the children of "such marriage or respective marriages," with a gift over in the event of a daughter dying "without leaving any issue her surviving."

M. A., the only daughter of the testator, was twice married. On her first marriage, she being then an infant, a settlement of her share was made on herself, husband and children, containing no provisions in favour of the husband or children of a future marriage. On her second marriage a settlement of her share was made whereby a life interest was limited to her second husband in the event of his surviving her, which happened. She subsequently died without leaving issue her surviving:—

Held, that the executory trust contained in the will authorized a settlement of a daughter's share on her for life with remainder to any husband she might leave for his life; and that the second husband of *M. A.* was accordingly entitled to a life interest in her share.

PETITION.

The testator, *Thomas Nash*, by his will, dated the 8th of February, 1845, gave and bequeathed his personal estate to *John Hunt*, *Thomas Hunt*, and his (the testator's) wife *Mary Ann Nash* (whom he appointed executors of his will), upon trusts for sale and conversion and investment of the proceeds, and after making provision for payment of an annual sum of £50 to his wife, the testator directed that his trustees should stand possessed of the trust moneys and the interest thereof in trust for all and every his present and future-born children, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under that age

(with the consent of her or their guardian or guardians respectively), and their respective executors, administrators and assigns, to be divided between or among them if more than one in equal shares and proportions, and if but one the whole to be in trust for that one or only child, and the will then continued as follows:—"And in case my daughter *Mary Ann*, or any future-born daughter, shall marry during their minority with the consent of their said mother, and of my said executors or the survivors or survivor of them first for that purpose had and obtained in writing, or in case she, they, or either of them shall marry after that age without such consent, then upon the further trust, and I do hereby direct my said trustees or trustee for the time being, to assign the share of such daughter or daughters so marrying to such person or persons as shall be then chosen by my said trustees or trustee to be trustees in settlement upon such respective marriage, to be held by them in trust for the benefit of such daughter or daughters so marrying, for her or their life, and for her or their sole and separate use, notwithstanding her or their covertures; and after her or their deceases for the use of her or their intended husband or husbands for his or their life, or lives, and after their decease respectively to the use of such child or children as shall or may be the issue of such marriage or respective marriages, in such manner as is hereinbefore directed as to my own children, and with the like powers as to maintenance and education and otherwise; but in case my said daughter or daughters shall die without leaving any issue her surviving, then I give their or her part or share so dying unto the survivors or survivor of my said children and the issue of any one of them who may be dead, such issue taking between them their parents' share only." The testator gave certain powers to his trustees in reference to the maintenance and education of his children.

The testator died on the 1st of March, 1845, and *Mary Ann Nash*, the widow, alone proved the will.

The testator had only three children, viz., *Mary Ann Nash* the younger, in the will named, and two sons, *Thomas Nash* the younger and *William Nash*.

On the 27th of February, 1852, *Mary Ann Nash* the younger,

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being then an infant, with the consent of her mother intermarried with *George Blyth*, and on that marriage a settlement of the same date was made between *Blyth* of the first part, *Mary Ann Nash* the younger of the second part, *Mary Ann Nash*, the widow, of the third part, and *R. Allen* and *J. Pilgrim* of the fourth part, whereby *Mary Ann Nash* the younger and *Blyth* respectively covenanted with *Allen* and *Pilgrim* that *Blyth* and *Mary Ann Nash* the younger, so soon as the latter attained the age of twenty-one years, would do and execute all things necessary for vesting in *Allen* and *Pilgrim* all such freehold, leasehold, and chattel estates and parts or shares of all such freehold, leasehold, and chattel estates as *Mary Ann Nash* the younger was possessed of or entitled to under the will of *Thomas Nash*, upon certain trusts for the benefit of *Mary Ann Nash* the younger during the joint lives of herself and *Blyth*, and after the death of either of them, for the survivor during his or her life, and after the death of the survivor for the children of the marriage, as *Blyth* and *Mary Ann Nash* the younger should jointly appoint, and in default of such appointment for all such children as being sons should attain the age of twenty-one years or die under that age leaving issue, or being daughters should attain that age or marry, and if more than one in equal shares; and it was provided that if there should be no child who should live to attain a vested interest in the trust premises, and *Mary Ann Nash* the younger should survive *Blyth*, the trust premises should be held in trust for her, but if *Blyth* should survive, then in trust for such persons as she should by deed or will appoint, and in default of appointment, as to real estate for her heir-at-law, and as to personal estate for her next of kin according to the *Statute of Distributions*.

The original settlement had been lost, and the only note of it was contained in the certificate of the Chief Clerk made in this action. It did not appear that the settlement contained any provisions for the husband or children of any future marriage of *Mary Ann Nash*.

In the year 1853 this action was instituted, and on the 3rd of June, 1853, judgment was given for the execution of the trusts of the testator's will.

George and *Mary Ann Blyth* had one child only, *George Herbert*

Blyth, who attained the age of twenty-one, and died on the 10th of February, 1885, intestate, and without having ever been married.

George Blyth died in the month of January, 1860.

On the 21st of August, 1860, *Mary Ann Blyth* married the defendant *Robert Peel*, and on that marriage a settlement of the same date was made between *Peel* of the first part, *Mary Ann Blyth* of the second part, and *O. B. Piers* and *J. Mead* of the third part. By this settlement, which contained recitals of the will of *Thomas Nash* and of the settlement of 1852, *Mary Ann Blyth*, with the consent of *Peel*, assigned certain funds in Court, representing her third part or share in the personal estate of the testator, and all her interest therein under the will of the testator, or any decree or order made or which might be made in the action, or under the settlement of 1852, or otherwise howsoever, to *Piers* and *Mead* upon certain trusts for the benefit of *Mary Ann Blyth* for life, and after her decease, as to such securities as the parties were competent to subject to such trusts, for the benefit of *Peel* during his life, and after the decease of the survivor for the benefit of *George Herbert Blyth*, and the children of the then intended marriage, as therein mentioned, with an ultimate trust for the benefit of *Mary Ann Blyth* to the exclusion of *Peel;* and thereby *Mary Ann Blyth*, so far as she lawfully might, elected to treat the settlement of 1852, made during her minority, as absolutely null and void, and as no wise binding on her.

On the 10th of March, 1888, letters of administration of the personal estate and effects of *George Herbert Blyth* were granted to *Mary Ann Peel*, his mother, and sole next of kin.

Mary Ann Peel died on the 22nd of October, 1888. There was no issue of her marriage with *Peel*, so that she left no child or issue her surviving.

Thomas Nash the younger and *William Nash* both died in the lifetime of *Mary Ann Peel*. *Thomas Nash* died intestate, and without having ever been married.

This petition was presented by children of *William Nash*, praying, *inter alia*, that it might be declared whether the Defendant *Peel* was entitled to any and if so what interest in the funds

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in Court representing the third part or share of *Mary Ann Peel* in the personal estate of the testator, *Thomas Nash.*

Marten, Q.C., and *Upjohn*, for the Petitioners:—

The intention of the testator evidently was that the settlement of a daughter's share should be made on the occasion of her first marriage, and the expression "intended husband or husbands" must refer to the husband or husbands of a daughter or daughters by her or their first marriage or marriages. The settlement of 1852 was an effectual and complete disposition of the daughter's share, and the subsequent settlement was inoperative to confer a life interest on the second husband.

Renshaw, Q.C., and *Stokes*, for the Respondent, *Robert Peel*:—

Under the original gift contained in the will the second husband is entitled to a life interest. From the terms of the ultimate gift over, which was not to take effect unless the daughter died without leaving issue her surviving, it is clear that the children of any marriage were intended to be benefited, and if the children of a subsequent marriage are included, there can be no reason why the husband of a subsequent marriage should not also participate. There is no express authority upon the point, but in the Irish case of *Mason* v. *Mason* (1), under an executory gift in favour of a son of the testator and his wife and children, a second wife was held entitled to a jointure by reason that the terms of the gift over shewed an intention to include the children of the son by any wife. The case of *In re Parrott* (2), where it was held that a future husband was not entitled to any benefit under an executory trust for a settlement, proceeded upon the ground that the existing husband was indicated, and has therefore no application. The settlement of 1852, made by Mrs. *Peel* when an infant, and by which she subsequently elected not to be bound, became inoperative upon her death without leaving issue surviving, and therefore cannot affect the right of Mr. *Peel* under the settlement of 1860.

Marten, in reply.

(1) I. R. 5 Eq. 288.

(2) 33 Ch. D. 274.

KAY, J. (after referring to the terms and effect of the will of the testator *Thomas Nash*, continued):—

Now, in the first place, I observe that this is an executory trust —a trust to be carried out by the making of a settlement, for which there is, of course, only a general direction; and in framing such a settlement the Court always exercises, if the settlement has to be made under the direction of the Court, and any conveyancer to whom the preparation of the settlement was submitted according to the will would in like manner exercise, a certain discretion in modifying the trusts. First of all, then, what children are to take? The will says, "such child or children as shall or may be the issue of such marriage or respective marriages." That is ambiguous, because "respective marriages" may mean the respective marriages of one daughter or of several daughters, if more than one; but then the gift over is not ambiguous, because it is in these terms, "in case my said daughter or daughters shall die without leaving any issue her surviving." That, of course, includes the issue of any marriage; if she marry two or three times, the gift over is not to take effect if there are issue who survive her, and that, I think, shews that the Court, in directing a settlement in execution of the trust, or any conveyancer preparing such a settlement, would take notice that, somehow or other, there ought to be in that settlement (which I consider is to be made on the occasion of the first marriage of the daughter) provisions for the children, at all events, if not for the other issue, which she might have by any marriage. Then the question is whether "intended husband" means any husband who may survive her, or is confined to the husband of the first marriage; and when I get so far as to see that the children who are to take include the children not only of the first, but of any subsequent marriage, certainly that affords a strong ground to a husband of a subsequent marriage for saying that the settlement ought to be so framed as to give a life interest to any husband of the daughter who survives her. It is said that that would be hard on the children of the first marriage. I do not see why it should be hard on them any more than on the children of any subsequent marriage. The husband of the first marriage was entitled to a life interest as against the children of that

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marriage. He could not, of course, take as against children of a second or subsequent marriage, because a second marriage could only take effect if he ceased to be husband by death or divorce. In the latter case he would have been the husband, but would take nothing under the gift. Therefore the gift must be to the "husband" who at the moment of the wife's death answers that description; and therefore I do not see why, in modifying this trust, as the Court would be obliged to do if it had to prepare a settlement according to the trust, the settlement ought not to be framed so as to give a life interest to any husband who survived, as well as—as I think it certainly ought—to the children of the daughter by any marriage. The testator had only one daughter, the daughter named in the will. She married in 1852, and on that occasion a settlement was made, which seems to ignore the will of the testator, as though he had never made it. It is not a settlement by the trustees of the will; it does not purport to be made, according to the note I have of it (for the settlement seems to be lost now) under the trusts of the will at all, though it does purport to settle parts or shares of estates derived under the will. The only note I have of it is in a certificate made in the action. [His Lordship referred to the terms of the settlement, and continued:—] In that settlement, so far as my information goes, there was no provision whatever for the children of a subsequent marriage, or for the husband of any subsequent marriage who might survive her, and the matter was treated as though she had an absolute power to dispose of this property as she liked. And, again, the limitation to children was in the case of sons to those who attained twenty-one, or died under that age leaving issue, whereas the limitation directed by the will was to children in such manner as the testator had directed, which simply was to sons attaining twenty-one, or daughters attaining that age or marrying under that age with consent of guardians. Now that settlement being made by this lady when she was an infant seems to me, under the circumstances which have happened, entirely inoperative. There was one child of that marriage who did live to attain twenty-one. He died in his mother's lifetime. The husband, *George Blyth*, also died in the lifetime of *Mary Ann Blyth*. She married again,

and upon her second marriage she treated the first settlement as one which she had power to elect to disregard, and, so far as she could, she elected to disregard it. She made another settlement. [His Lordship referred to the terms of the settlement of 1860, down to and including the limitation of the life interest to the husband, and continued:—] I need not go further, because there were no children of that marriage. She died on the 22nd of October, 1888, and the husband is surviving; and as the son who died in her lifetime had no issue, so that she left no issue surviving her, the ultimate gift over in her father's will would, according to its literal terms, take effect, and the only question is whether the husband of the second marriage takes a life interest. Now, my doubt has been chiefly this. It seems to me that there would be two modes of framing a settlement under this executory trust. One would be to make the settlement on the wife for life, with remainder to any husband she might leave for his life, and subject to those limitations to any children of the wife who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. That, it seems to me, would follow most literally the terms of this direction; but I quite agree that is not the ordinary form of settlement, and the doubt I had was, whether the more ordinary form of settlement would not be to give it to her for life, with remainder to the intended husband—the intended husband being mentioned in the will—of the first marriage, if he survived her, for his life, and then to the children of that marriage, with power to her to appoint in favour of a husband of a subsequent marriage for his life, and of the children of a subsequent marriage. However, upon the whole, I think that I ought to read the executory trust rather more liberally, and that the paramount intention was to give a life interest to any husband who survived the daughter of the testator, and therefore, in the events which have happened, I think that the surviving husband, *Robert Peel*, takes a life interest, and that, subject to that life interest, the property passes under the gift over.

Solicitors: *May, Sykes & Batten*; *Philip Thornton.*

C. C. M. D.

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May 30; *June* 4.

In re BALLANCE.
BALLANCE *v.* LANPHIER.

[1889 B. 1366.]

Will—Construction—Residue—Direction that Share of Residue shall sink into Residue—Share of Residue "to be Settled" upon same Trusts as Legacy.

A testator gave legacies upon certain trusts for each of his daughters for life, and, after her death, for her husband and children, and subject thereto he directed that each legacy should "sink into, and form part of, my residuary estate and be applied and disposed of as hereinafter mentioned." He gave his residue to his children equally, "the shares of daughters to be paid to the same trustees respectively and to be settled upon the same trusts" as their respective legacies. One of the daughters having died unmarried:—

Held, that the direction for settlement of daughters' shares of residue being executory, the Court, in framing a settlement of such a share, would modify the ultimate gift over by inserting a limitation in favour of the other residuary legatees excluding the particular daughter, and that the share of the deceased daughter of the testator was divisible accordingly among the other residuary legatees.

Humble v. *Shore* (1), *Crawshaw* v. *Crawshaw* (2), and other cases considered.

ADJOURNED SUMMONS.

The testator, *John Ballance*, who died in 1863, by his will, dated in 1862, gave £10,000 New £3 per cent. Annuities to trustees in trust for his daughter *Eliza* for life, and after her death for her children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, and if no such children as to one fifth for *Eliza's* appointees by will, and in default of appointment to sink into and form part of his general residuary estate, and as to the other four fifths, after giving a life interest therein to any husband whom *Eliza* might leave surviving her, he declared that the same should "sink into and form part of my general residuary estate, and be applied and disposed of as hereinafter mentioned." He made a similar disposition by reference in favour of his daughter *Mary*, her husband and children, with a like gift over, and after making other dispositions, devised and bequeathed the general residue

(1) 7 Hare, 247; 1 H. & M. 550, n. (2) 14 Ch. D. 817.

of his real and personal estate "unto and equally amongst my children living at the time of my decease, share and share alike, the shares of daughters to be paid to the same trustees respectively, and to be settled upon the same trusts as their respective sums of £10,000 annuities, hereinbefore given, except that my daughters respectively shall have no power of disposing by will of any part of their respective shares of my residuary estate."

The testator left seven children surviving him, viz., five sons and the two daughters *Eliza* and *Mary* in the will named. *Mary* afterwards died a spinster, having, as to one fifth of her legacy, exercised the power of appointment given to her by the will. Accordingly upon her death the other four fifths fell into the general residue.

This was an originating summons by the trustees of the will, as Plaintiffs, against *J. H. Lanphier*, one of the next of kin of the testator, as Defendant, asking that it might be determined whether the one-seventh share of the residue of the real and personal estate of the testator given by the will to or upon trust for his daughter *Mary Ballance* was undisposed of by the will or given to the other residuary legatees or devisees, or to whom the same belonged.

By order of the Court the Defendant was appointed to represent the other next-of-kin of the testator.

It did not appear that there was any residuary real estate of the testator.

Marten, Q.C., and *Chadwyck Healey* for the Plaintiffs :—

The share of *Mary Ballance* ought to be divided in sixths among the other residuary legatees; that is the rational construction of the gift over: it is also the literal construction, for the effect of the gift is to send the one-seventh of *Mary* into the residue, to be divided into seven parts, one of which, being attributable to her share, is in like manner sent into the residue and again divided, and so on *ad infinitum*: *Atkinson* v. *Jones* (1); *Harris* v. *Davis* (2); *Evans* v. *Field* (3); *Crawshaw* v. *Crawshaw* (4); *In re Rhoades* (5).

(1) Joh. 246.
(2) 1 Coll. 416.
(3) 8 L. J. (N.S.) Ch. 264.
(4) 14 Ch. D. 817.
(5) 29 Ch. D. 142.

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[They also referred to and distinguished *Humble* v. *Shore* (1), *Lightfoot* v. *Burstall* (2), and *In re Barker's Estate* (3).]

[KAY, J., referred to *Sykes* v. *Sykes* (4)].

Renshaw, Q.C., and *St. John Clerke*, for the Defendant:—

There is an intestacy as to the share of *Mary Ballance*. The authorities are in conflict, and *Humble* v. *Shore* and *Lightfoot* v. *Burstall*, followed by *Hall*, V.C., in *In re Barker's Estate*, ought to be regarded rather than *Crawshaw* v. *Crawshaw* (5), followed by *Bacon*, V.C., in *In re Rhoades* (6). The reasoning in *Crawshaw* v. *Crawshaw*, as reported in 29 W. R. 68, was not satisfactory: the Court there was in fact making a will for the testator.

[They referred also to *Skrymsher* v. *Northcote* (7), and *In re Beviss's Trusts* (8)].

Marten, in reply.

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The question is what becomes of *Mary's* one-seventh share of the residue.

Reading the will literally, without modifying any of the words, her share of residue, upon her death unmarried, became subject to the gift over expressed in the words to "sink into, and form part of, my general residuary estate, and be applied and disposed of as hereinafter mentioned." The one-seventh share must therefore be subdivided into seven parts, one of which, being subject to the same trusts, must again be subdivided in like manner, and thus in effect the result would be to divide the whole one-seventh among the other six residuary legatees, excluding *Mary*.

The difficulty arises from the authorities upon the effect of similar wills. In *Humble* v. *Shore* the gift over of a share of residue was in the words "shall sink into the residue of my

(1) 7 Hare, 247; 1 H. & M. 550, n.
(2) 1 H. & M. 546.
(3) 15 Ch. D. 635.
(4) Law Rep. 3 Ch. 301.
(5) 14 Ch. D. 817.
(6) 29 Ch. D. 142.
(7) 1 Sw. 566.
(8) 20 W. R. 359.

personal estate and be disposed of accordingly." Vice-Chancellor *Wigram*, after consideration, determined that this was not a gift over of the share to the residuary legatees or any of them, but that the share went as undisposed of to the testator's next of kin.

This decision was followed by Lord *Hatherley* in *Lightfoot* v. *Burstall* (1), where the words of the gift over were substantially the same.

But in *Crawshaw* v. *Crawshaw* (2), where the words were "shall fall into and become part of my residuary personal estate, and be paid and applied according to the trusts of my will," Sir *George Jessel*, M.R., disapproved of the two former decisions, but held himself bound by them, and decided that in the case before him the gift over was to the other residuary legatees excluding the one whose share went over. The reason for this decision is not given explicitly in the authorized report, where that part of the judgment is stated very concisely. But in the fuller report in 29 W. R. 68, it appears that he did not arrive at this conclusion in the mode I have suggested, but because he considered that the rational view was that this share was intended to go over to the other residuary legatees only.

In *Barker's Estate* (3) V.-C. *Hall* followed *Humble* v. *Shore* (4).

In *In re Rhoades* (5) V.-C. *Bacon* followed *Crawshaw* v. *Crawshaw*.

In the case before me there is another consideration which struck me during the argument, and which upon reflection appears to me to be of great importance. The direction as to the shares of daughters in the residue, is that they are "to be settled upon the same trusts as their respective sums of £10,000 annuities," except that the daughter is not to have any power of disposition by will. The words "to be settled" have often been held to create an executory trust, in carrying out which the Court would modify any inapt provision. Here where the settlement is to be such as to apply the trusts of a legacy to a share of residue, the ultimate direction that the legacy shall fall into the

(1) 1 H. & M. 546.
(2) 14 Ch. D. 817.
(3) 15 Ch. D. 635.
(4) 7 Hare, 247; 1 H. & M. 550, n.
(5) 29 Ch. D. 142.

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residue would be modified in framing a settlement of a share of residue; and the necessity for this seems to me to confirm the view that this is an executory trust. The obvious modification would be to limit the share of any daughter who died without issue capable of taking, so as to go over to the other residuary legatees excluding the deceased daughter.

I am of opinion that this is the proper construction of the will before me. *Mary's* share must go among the other residuary legatees upon like trusts as to the share of a daughter of the testator, modifying the ultimate gift over as I have suggested.

Solicitor: *Charles A. Bannister.*

C. C. M. D.

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DREYFUS *v.* PERUVIAN GUANO COMPANY.

[1880 D. 0192.]

*Damages—Detention of Goods—Measure of Damages—Right to Damages not taken away by Appointment of Receiver by Consent—Jurisdiction—Interest by way of Damages—*3 *&* 4 *Will.* 4, *c.* 42, *ss.* 28, 29 [*Revised Ed. Statutes, vol. vii. p.* 415]—*Lord Cairns' Act* (21 *&* 22 *Vict. c.* 27), *s.* 2 [*Revised Ed. Statutes, vol. xiii. p.* 268]—*Wrongdoers—Vindictive Damages—Inquiry—Burden of Proof.*

Where property belonging to a plaintiff has been detained by the defendant under such circumstances as to give a right to damages, such right is not lost by the appointment of a receiver by consent, or by any other mode of placing the property *in medio* pending the trial of the action.

Williams v. *Peel River Land and Mineral Company* (1) followed.

The Plaintiffs, a mercantile firm, brought an action against the Defendants, a trading company, for delivery to the Plaintiffs of certain cargoes then at sea, to which the Plaintiffs claimed to be entitled, for an injunction to prevent the Defendants from receiving them, and for damages for their detention. The Defendants by their pleadings claimed the right to receive the cargoes, and shewed that they intended to receive them. Previously to the hearing of the action orders were made by consent placing the cargoes *in medio* until the hearing. At the hearing the Plaintiffs proved their title to the cargoes:—

Held, that the action must be considered an action of trover or detinue, brought in the Chancery Division by the Plaintiffs *quia timent*, in anticipation of and to prevent the actual threatened receipt by the Defendants;

(1) 55 L. T. (N.S.) 689.

that the Court had jurisdiction to give damages; that the Plaintiffs were entitled to damages by way of compensation for their loss in respect of being kept out of possession of the cargoes, and that such loss was rightly measured by 5 per cent. interest upon the value of the cargoes down to the date of the judgment.

Consideration of the principles upon which vindictive damages are given against wrong-doers.

Judgment was given in an action declaring that the Defendants were not entitled to reimbursement for certain expenses incurred by them. On appeal to the House of Lords the judgment was varied by allowing the expenses "so far as the same have not been already repaid to them or allowed to them in account with" third persons, such qualifying words being inserted at the instance of the Plaintiffs:—

Held, that the burden of proving repayment or allowance in account rested on the Plaintiffs.

ADJOURNED SUMMONS.

On the 7th of June, 1876, the Peruvian Government entered into a contract (known as the *Raphael* contract) with the Defendant company to consign to them for sale eleven cargoes of guano in respect of which the company were to receive £4 15*s*. a ton, for freight and other expenses, and the rest of the proceeds were to be for account of the Government, to whom the company were to make certain advances against the cargoes. The eleven cargoes were shipped about December, 1879.

Disputes arose between the Government and the company as to whether the cargoes were within the contract; and the result of such disputes was that the Government sent the bills of lading of the cargoes to the Plaintiffs, Messrs. *Dreyfus*, who carried on a financial business in *Paris*. The company, however, claimed possession of the cargoes and accordingly, on the 27th of April, 1880, the writ in this action was issued by Messrs. *Dreyfus* against the company and the masters of the ships, claiming delivery of the cargoes to the Plaintiffs, and an injunction to prevent the company from receiving them.

The Plaintiffs moved for an injunction and receiver, and on the 30th of April, 1880, an order was made on that motion, whereby, the company consenting, the action was dismissed against the masters of the eleven ships without costs; and the company undertaking that the receipt by them of the cargoes should be without prejudice to any question between the parties,

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and that they would keep separate accounts of expenditure and receipts in respect of the cargoes, and abide by any order the Court might make as to them or the proceeds of them, it was ordered that the costs of the motion should be costs in the action, and that the order should be without prejudice to any question in the action. At the date of this order only two of the ships had arrived, and none of the cargoes had been actually received by the company.

On the 16th of July, 1880, the statement of claim was delivered, and was amended on the 10th of March, 1881. It claimed delivery to the Plaintiffs of the cargoes, damages for their detention, and an injunction against the receipt of them by the company.

On the 9th of November, 1880, the defence was put in, stating that the company had taken possession of the cargoes, but denying that such possession was wrongful, and denying the Plaintiffs' claim to the property in the cargoes and claiming for the company the right to receive them.

By an order of the 16th of September, 1880, the company were allowed to receive the cargo of one of the ships, *Malabar*, without prejudice to any question.

On the 17th of December, 1880, an order was made for the appointment of a receiver of all the eleven cargoes, or the proceeds of any sold, and on the 23rd of February, 1881, a receiver was appointed.

By an order of the 8th of March, 1881, the company were nevertheless permitted to sell the cargoes of two ships, the *Nore* and *Queen of the Mersey*, and to pay the gross proceeds to the receiver, and by another order of the 26th of February they were permitted to retain £6316 4*s.* received for cargo of the *Flora* (which had been sold out of Court) on account of expenses, which were to be paid to them without prejudice to any question.

On the 13th of January, 1885, Vice-Chancellor *Bacon* gave judgment in the action, declaring the Plaintiffs entitled to the cargoes, and that the company were not entitled to be reimbursed any expenses incurred by them in respect of any of the cargoes, except the *Nore* and *Queen of the Mersey* under the order of the 8th of March, 1881, and the judgment directed an inquiry "what

damages have been sustained by the Plaintiffs by reason of the detention by the Defendant company of the cargoes of guano in question in this action."

The company appealed against this judgment.

Before the appeal was heard, an agreement (called the *Izcue* agreement), dated the 29th of May, 1885, was made between the Peruvian Government and the company.

On the 12th of February, 1886, the Court of Appeal affirmed the judgment, but on the 18th of July, 1887, the House of Lords varied it, by allowing to the company the freight and landing-charges in respect of the cargoes received by them "so far as the same have not been already repaid to them or allowed to them in account with the Peruvian Government." They affirmed the decision in other respects.

Under these circumstances, on the 12th of March, 1889, the Chief Clerk made his certificate, finding the damages for detention of the cargoes to be as follows:—£2148 13*s.* 2*d.*, diminution of gross proceeds owing to sale by receiver instead of Plaintiffs; £351 6*s.* 10*d.* increased expenses of sale under Orders of Court; £26,757 2*s.*, damages for loss of interest on those sums, and on actual proceeds of the cargoes computed at 5 per cent. till judgment, less interest gained in Court, and paid by receiver; £854 6*s.* 9*d.* damages for non-payment of these moneys at 4 per cent. from judgment to the date of the certificate.

The disbursements of the company for freight and landing-charges were found to be £44,000 and for interest thereon at 4 per cent. to the date of the certificate, £15,060 16*s.* 3*d.*; but the certificate found "there is not any sum remaining due in respect thereof, all such sums so disbursed having been already repaid to the Defendant company, or allowed them in account with the Peruvian Government," and the certificate then proceeded to state how this was made out.

This was a summons to vary the Chief Clerk's certificate, raising two questions; first, whether the Plaintiffs were entitled to damages for detention by the Defendants of the eleven cargoes, and secondly, whether the Defendants had been paid or allowed in account by the Peruvian Government, £4 15*s.* a ton, the agreed payment for freight and other charges in respect of these cargoes.

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The first only of these questions calls for a detailed report.

Sir *R. E. Webster*, A.G., *Rigby*, Q.C., and *Haldane*, for the Defendants in support of the summons:—

Nominal damages only ought to be given, in order to satisfy the inquiry. There was no actionable wrong by the company for which damages can be awarded. Damage is a legal term and does not mean mere loss. It is not a wrongful act to assert title to property, unless the assertion is malicious and results in injury.

By the order of the 30th of April, 1880, an arrangement took place whereby, by consent of the owners of the cargoes and for their convenience, the Defendants took the management of the property, keeping accounts and being responsible. After that date there could be no such wrongful possession as would give a right to damages: *Walker* v. *Olding* (1). The possession of the receiver, who was subsequently appointed, was attributable to the real ownership of the property, when ultimately ascertained; and upon such possession being taken, detention necessarily ceased.

The Vice-Chancellor held that the company, being wrongdoers, were not entitled to any reimbursement, even for expenses incurred by them subsequently to the order of the 30th of April, 1880; but the House of Lords varied that judgment by deciding that the company were entitled to reimbursement, and the result of their decision is that there was no unlawful possession by the company, and therefore no detention.

The Court cannot treat that as damage which the House of Lords, in the same action and between the same parties, has held not to be wrongful. Moreover, the inquiry fixed no time at which the detention began or ceased, and it was not intended that the Chief Clerk should arbitrarily fix upon any periods of time. The inquiry was limited to detention of the cargoes, and there was no suggestion that the Plaintiffs were entitled to damages for detention of the proceeds. The effect of the Chief Clerk's finding is to throw over the word "detention," and treat the inquiry as if it were as to loss occasioned by this litigation.

(1) 1 H. & C. 621.

Sir *Horace Davey*, Q.C., and *Ingle Joyce*, for the Plaintiffs :—

The certificate of the Chief Clerk is right and ought to be upheld.

The contention of the Defendant company would amount to this, that a man may deny the rightful title of another, keep him out of his property for years, and then leave him to recover what that property has sold for, and the costs of the action. It is said that malice ought to be shewn. But a man may make an unfounded claim, without being malicious, and the injury to his neighbour may be none the less.

The proceedings in the action were merely an arrangement by which the cargoes were placed in safe custody and disposed of on behalf of all parties pending the decision of the title to them. The loss to the Plaintiffs was occasioned by the deprivation of possession, and their right to compensation for such deprivation could not be affected by proceedings putting the property *in medio* or by the appointment of a receiver: *Williams* v. *Peel River Land and Mineral Company* (1). The receiver was merely the officer and agent of the Court to keep the property *in medio.*

The whole struggle in the action was as to the right of property in the cargoes, and the inquiry directed by the Vice-Chancellor was consequent upon the declaration that the cargoes belonged to the Plaintiffs. In accordance with the established practice in the Chancery Division, the Vice-Chancellor determined at the trial that the Plaintiffs were entitled to damages for being kept out of their property. It is said that the inquiry will be satisfied by giving nominal damages. But it is not the practice to direct an inquiry, if the Judge thinks that the damages are only nominal. And the inquiry is not "whether any and what damages" have been incurred, but simply "what damages." The variation of the judgment by the House of Lords in no way affected the inquiry, but had reference to a separate matter, namely, the right of the company to reimbursement in respect of their expenditure for freight and landing-charges.

The measure of damages has been rightly arrived at. The action is an equitable action analogous to an action of trover or trespass *de bonis asportatis* in which, by 3 & 4 Will. 4, c. 42,

(1) 55 L. T. (N.S.) 689.

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s. 29, a jury are empowered to give damages in the nature of interest; and in *Williams* v. *Peel River Land and Mineral Company* (1) damages on that footing were given. The statute is merely declaratory of the common law, and before the statute juries in proper cases had a right to give interest in the way of damages: *Webster* v. *British Empire Mutual Life Assurance Company* (2), *Cameron* v. *Smith* (3), *Higgins* v. *Sargent* (4). And under the jurisdiction conferred by *Lord Cairns' Act* (21 & 22 Vict. c. 27), sect. 2, and which still subsists notwithstanding the repeal of that Act, the Court has full power to give damages to the Plaintiffs, as in an action *quia timent*, for the loss sustained by reason of the wrongful claim of the Defendants.

Rigby, in reply:—

Williams v. *Peel River Land and Mineral Company* was a true action of detinue. The bank in that case were tortiously in possession of shares by holding the certificates, and remained so throughout, and it was not a question of a claim of title, but an action for wrongful taking. This is not an action of detinue or trover within 3 & 4 Will. 4, c. 42.]

[KAY, J.:—I suppose you do not deny that if possession of the cargoes had been taken by the company before the writ, the Act would have applied?]

No doubt it would; the action would then have been one of trespass. Sect. 29 of 3 & 4 Will. 4, c. 42 is not declaratory of the common law. In *Webster* v. *British Empire Mutual Life Assurance Company* (5), *Thesiger*, L.J., intimated that sect. 28 was declaratory, but neither in that case nor *Cameron* v. *Smith*, nor *Higgins* v. *Sargent*, was it suggested, nor is there anything to shew, that sect. 29 is declaratory. All that the Court decided in *Webster* v. *British Empire Mutual Life Assurance Company* was that by the bringing of a new case within the law of damages the idea at the foundation of damages that there must be default is not ousted. It would have been easy, if the legislature had so intended, to have enacted that juries should have power in

(1) 55 L. T. (N.S.) 689.
(2) 15 Ch. D. 169.
(3) 2 B. & Al. 305.
(4) 2 B. & C. 348.
(5) 15 Ch. D. 169, 178.

every case to award interest by way of damages. If damages cannot be given in an action grounded on the completed act, neither can they in respect of a mere threat to do the act.

1889. June 22. KAY, J. (after stating the facts of the case as above set forth, continued):—

Upon the first question an extremely interesting argument has been addressed to me, to which I hope to give full and adequate consideration.

To summarise it very shortly, it is said there is no law by which damages for detention could be given in such a case as this. Damage is a legal term, and does not mean mere loss. No doubt the Plaintiffs have suffered loss by not receiving the cargoes when they arrived, and that loss was occasioned by the Defendants' claim; but the making such a claim—at least if *bonâ fide*—is not an actionable wrong, and no damages can be given unless it were. The judgment, it is true, contains the inquiry. In strictness, it is urged, it ought not to be there; being there, 40*s.* only ought to be given.

I will first consider the matter as though I were now asked to pronounce judgment. By 3 & 4 Will. 4, c. 42, s. 29, a jury are empowered "in all actions of trover or trespass *de bonis asportatis*" to "give damages in the nature of interest," in addition to the value of the goods at the time of seizure.

If the cargoes had been taken possession of by the company before the writ, this Act would have applied.

By *Lord Cairns' Act* (21 & 22 Vict. c. 27), s. 2, Courts of Equity in suits for injunction may in addition to or substitution for that relief give damages. This power, by sect. 16 of the *Judicature Act*, 1873, was vested in the High Court, and is not affected by the subsequent repeal of *Lord Cairns' Act*, by 46 & 47 Vict. c. 49, s. 6: *Sayers* v. *Collyer* (1).

This action, therefore, treated as an action to recover the cargoes then at sea, and to prevent the company from receiving them, was commenced in the Chancery Division in order to obtain an injunction to prevent the threatened receipt by the company, and it is not denied that if the company had taken

(1) 28 Ch. D. 103.

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possession of the goods under their claim of right, after the commencement of the action, the Chancery Division, under *Lord Cairns' Act*, would have had jurisdiction to give damages, or that it would have been a proper exercise of discretion to do so.

In my opinion that would be a clear case for giving damages, and in an action like this between mercantile men on the one hand, and a trading company on the other, the proper measure of such damages would be interest on the amount which the Plaintiffs had been prevented from receiving to the date of the judgment at the rate of 5 per cent.

Then does the order of the 30th of April, 1880, or the subsequent appointment of a receiver make any difference?

When once the jurisdiction to give damages is established, the question is, what loss have the Plaintiffs sustained? Their loss by detention is measured in law by interest at 5 per cent. How much of that amount have they been prevented from receiving? That is their loss. That is exactly what this certificate has given. Why should not the Plaintiffs recover it? To them it is entirely the same whether the Defendant company had possession, or whether, by reason of their claim, the possession was in the receiver or any other person. The Plaintiffs were deprived of possession. That fact occasioned their loss. I can see no reason why the Plaintiffs, having been compelled by the claim of the Defendants to put the property *in medio* by an order to which all parties consented, or by appointing a receiver, should lose their right to compensation. In *Williams* v. *Peel River Land and Mineral Company* (1) there is a very instructive judgment on this subject by Lord Justice *Bowen*. In that case the bank, who were defendants, had obtained possession before action of the certificates of certain consolidated stock in the company, who were co-defendants. The plaintiffs moved for an injunction to restrain transfer of the stock. An order was thereupon taken by agreement, though not so expressed, by which the bank, who held the certificates, undertook not to sell the stock except with the consent of the plaintiffs, the plaintiffs giving the usual undertaking in damages. The learned Judge before whom the case first went refused to give any damages in

(1) 55 L. T. (N.S.) 689.

respect of loss by delay of sale after that order, because the plaintiffs might have applied for a sale, and the bank would probably have consented. He therefore inferred that the plaintiffs did not desire to sell. The Court of Appeal did not think the inference was warranted, and gave damages. Lord Justice *Bowen* said (1): "If, in an action for wrongful detention by one man of that which belongs to another, there be no substantial loss at all sustained, but the mere denial of the right, which right is vindicated in the course of the action, in such a case, there being no pecuniary damage sustained, no pecuniary compensation is given, and nominal damages will be enough; but, if a substantial loss has been suffered in consequence of the wrongful act, what those who have to redress the wrong ought to do is to give compensation for the loss. You do not give damages in an action for detention *in pœnam*; it is not a paternal correction inflicted by the Court, but simply compensation for the loss." Lord Justice *Bowen* says, further on, that he agrees that it was wrong to assume that the plaintiffs were precluded from maintaining that they would have sold the stock by the mere fact that they applied for an injunction.

The order taken by agreement in that case practically put the stock *in medio*, just as the appointment of a receiver or deposit in Court would have done. But the decision of the Court of Appeal proceeds upon the basis that, notwithstanding the order, there was in law a detention by the defendants, who made an adverse claim. In short, where detention and the right to damages in respect thereof exists, it is not lost or taken away by the appointment of a receiver, even by consent.

The passage which I have quoted shews distinctly that the reason for this is, that the plaintiff is none the less out of possession, and compensation for his loss in this respect is the measure of the damages to which he is entitled.

In that decision I respectfully concur. This action may be considered an action of trover or detinue, brought in the Chancery Division by the Plaintiffs *quia timent*, in anticipation of and to prevent the actual threatened receipt by the Defendant company. The Defendants by their pleadings claim the right to

(1) 55 L. T. (N.S.) 692.

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receive the cargoes, and shew that they intend to receive them. Whether, after action, they actually received them, or were only prevented from doing so by an agreed order upon a motion for injunction, or, what is equivalent, the appointment of a receiver, or any other mode of placing the cargoes *in medio*, in my opinion the Court had jurisdiction to give damages. It was a proper case for damages, and the right measure of damages was the loss suffered by the Plaintiffs. The loss in respect of their being kept out of possession was rightly measured by 5 per cent. upon the value down to the date of the judgment.

The other items of damage were less strongly contested. I think they are rightly awarded. The Plaintiffs could not have complete compensation without them.

No question as to the amount has been raised before me.

I might, I think, have disposed of this question more summarily by simply relying on the judgment, which contains this inquiry, and which has been affirmed by the House of Lords. The inquiry is not "whether any and what damages" have been incurred, but simply "what damages." In that form the Court must have decided that the Plaintiffs were entitled to damages for detention, and the only meaning which can fairly be given to it is that there was what amounted to detention from the arrival of the cargoes to the date of the judgment.

It was argued that this result was arrived at in the first instance by the view taken by the learned Judge of the order of the 30th of April, 1880, which the House of Lords determined to be erroneous. It is urged that the result of their decision is that there was no detention, because there was no unlawful possession by the company. In my opinion that is not the result of the decision of the House of Lords.

By the original judgment the company were deprived of all expenses they had been put to in respect of the cargoes, upon the principle on which a wilful trespasser in mining, taking coal which he knows belongs to another, has been charged with the value of the coal at the pit's mouth—that is, as a manufactured chattel—without any allowance for the cost of severing—in other words, for the cost of manufacture: *Martin* v. *Porter* (1). The

(1) 5 M. & W. 351.

logic of such decisions is, no doubt, questionable. In such a case the plaintiff may get more than compensation for his loss. The disallowance of the cost of manufacture is rather by way of punishing a wilful wrongdoer than compensating the owner of the coal. But in those cases the cost of manufacture is allowed to the wrongdoer if his trespass has been a *bonâ fide* mistake, and not a wilful act of plunder, though the loss to the plaintiff is just the same: *Livingstone* v. *Rawyards Coal Company* (1). This shews conclusively that refusing to give the cost of manufacture in the other case is in order to punish the defendant, not to compensate the plaintiff; the reasoning by which this result was arrived at being that the coal could be recovered in trover, and the wrongdoer would have no lien upon it for the expenses of manufacture. But the right of the owner to compensation for loss is not affected by the question whether the detention was a wilful wrong or not. He is entitled to full compensation in either case; and the House of Lords, by refusing what I may call the vindictive portion of the damages, did not decide that the Plaintiffs in this case were to lose any of the compensation for loss to which they were entitled.

The answer to the second question depends upon the meaning of the *Izcue* contract and the inference to be derived from it, and from the circumstances under which it was given. [His Lordship proceeded to consider this part of the case, and having stated his view of the result of the evidence, continued:—]

I do not profess to arrive at this result with certainty. But in this state of the evidence it is essential to determine upon whom is the burden of proving that this sum has been allowed in account. It seems to me unquestionable that the onus is upon the Plaintiffs, at whose instance the words "so far as the same have not been already repaid to them or allowed to them in account with the Peruvian Government," were inserted in the order of the House of Lords. This insertion was made when the *Izcue* agreement was before the Court as part of the evidence in the case. The Plaintiffs therefore undertake to shew that these sums have been paid or allowed in account notwithstanding that agreement.

(1) 5 App. Cas. 25.

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Whatever else may be doubtful, I am clearly of opinion that the Plaintiffs have not proved that these sums have either been paid or allowed in account. Then, have they produced such *primâ facie* evidence as would shift the onus of proof and make it incumbent on the company to rebut it? Their whole case rests on the accounts sent from time to time to the Government. I do not think that the burden of proof is thrown on the company. But if it were, any inference from these accounts seems to me to be rebutted by the terms of the *Izcue* agreement.

On the whole I am of opinion that this certificate, which has been most carefully prepared, must be varied by omitting the finding that these sums have been paid or allowed in account.

Solicitors for Plaintiffs: *G. M. Clements.*
Solicitors for Defendants: *C. & S. Harrison & Co.*

C. C. M. D.

HARRIS *v.* TUBB.

KEKEWICH, J.

1889

April 2, 3.

[1887 H. 2737.]

Voluntary Assignment of Leaseholds—Vendor's Lien.

An assignment of leaseholds in consideration of natural love and affection, *held* not voluntary.

Price v. *Jenkins* (1) followed.

As the result of various dealings not necessary to be stated for the purpose of this report, *William Tubb* was at the date of the next stated indenture owner of certain leaseholds for a term of eighty-six and three-quarter years, subject to a peppercorn rent and lessees' covenants, and, in the view taken by the Court of the evidence, subject to a vendor's lien for £148.

By an indenture dated the 24th of March, 1880, and made between *William Tubb* of the one part and his son *Alfred John Tubb* of the other part, in consideration of the paternal love and affection which the said *William Tubb* had towards the said *Alfred John Tubb*, he the said *William Tubb* assigned the same hereditaments unto the said *Alfred John Tubb* for the residue of the said term of eighty-six and three-quarter years subject to the peppercorn rent and to the lessee's covenants.

It was not alleged that *Alfred John Tubb* had notice of the vendor's lien.

Alfred John Tubb subsequently mortgaged this and other property to *Emma Harris*, the Plaintiff, and died. She brought this action against *Amelia Bayley Tubb*, administratrix of *Alfred John Tubb*, and against the vendors to *William Tubb*, claiming, *inter alia*, a declaration that any charge or lien to which the vendors might be entitled ought to be postponed to the Plaintiff's mortgage.

Warmington, Q.C., and *MacSwinney*, for the Plaintiff.

S. Hall, Q.C., and *P. V. Smith*, for the Defendants, the vendors:—

Under the circumstances there is a vendors' lien for the £148,

(1) 5 Ch. D. 619.

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and it can be enforced, as the deed of 1880 was a voluntary conveyance.

Powell, for another Defendant.

Oswald, for *Amelia B. Tubb*:—

The deed of 1880 relieved *William Tubb* from liabilities under the lease, and therefore was for valuable consideration: *Price* v. *Jenkins* (1); and was without notice of any lien.

S. Hall, in reply, for the trustees of the settlement:—

We claim a specific lien on the property for the £148 unpaid purchase-money. The deed of 1880 is a mere voluntary deed and cannot avail against our lien. A conveyance of leaseholds is not necessarily for value. When there is a real bargain and sale and any inducement to get rid of property the consideration may be valuable: *In re Lulham* (2); but here it is not so, as the property was valuable and was at once mortgaged. No doubt *Price* v. *Jenkins* is against our contention, but that case has not been approved of and will not be extended, and was under the statute of 27 Eliz. c. 4: *Green* v. *Paterson* (3); *Hamilton* v. *Molloy* (4); *Gardiner* v. *Gardiner* (5); *Ex parte Hillman* (6); *In re Ridler* (7); *In re Marsh and Earl Granville* (8); *Lee* v. *Mathews* (9).

KEKEWICH, J., held that, on the facts, the vendors had a lien for £148 unpaid purchase-money against *William Tubb*, and continued:—

If *Alfred John Tubb* was a mere voluntary assignee of *William Tubb* he was in no better position than his father, nor can his legal personal representative be in any better position. I have heard an interesting argument on the question whether that deed was a voluntary deed within the rule which makes voluntary assignees subject to liens of this kind. On the face of the deed

(1) 5 Ch. D. 619.
(2) 32 W. R. 1013.
(3) 32 Ch. D. 95.
(4) 5 L. R. Ir. 339.
(5) 12 Ir. C. L. R. 565.
(6) 10 Ch. D. 622.
(7) 22 Ch. D. 74.
(8) 24 Ch. D. 11.
(9) 6 L. R. Ir. 530.

it is voluntary; that is to say, there is a good consideration, which is natural love and affection, as distinct from valuable consideration. That seems to have been the consideration in this case, because the property was valuable and money was raised upon it soon after. If it were not for the decision in *Price* v. *Jenkins* (1) I should regard that deed as a voluntary deed and declare the vendors' lien good against the representative of *Alfred John Tubb.* But that case was decided twelve years ago, and though it has been very much canvassed, and probably it is not too much to say that it has not received the unqualified approval of the profession, yet it has not been overruled. It is quite true that the case arose under the statute 27 Eliz. c. 4, and that there was everything to make the Court uphold the assignment, which was an assignment for value, because, as has been said over and over again, about which there is no question, to set aside such an assignment and get rid of it, is to countenance a fraud; but Lord Justice *James,* though in his judgment he decides the question (the question which he had to consider there arising under the statute of 27 Eliz.), used language which, as I must not forget, has passed under his eye and has been allowed to stand as part of the case, after revision by him. He says, "Can an assignment of leasehold property ever be, strictly speaking, voluntary? I remember a case in my own practice at the Bar, which is not reported, in which the owner of three leasehold houses made a promise on his deathbed to give one of them to his widow; and the executor accordingly signed a written agreement to assign one of the houses to the widow, she undertaking to pay an apportioned rent of one guinea to the ground landlord and performing the covenants of the lease. I advised that this was a *nudum pactum,* but it was held by Vice-Chancellor *Shadwell* to be an agreement for valuable consideration." It may be that Vice-Chancellor *Shadwell's* decision was wrong. It may be that the question of Lord Justice *James* which he puts there ought to be answered in the affirmative—that an assignment of leasehold property can, strictly speaking, be voluntary; but that is not consistent with the way in which it is put in the case, or, as I understand it, with the decision in the case,

(1) 5 Ch. D. 619.

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HARRIS v. TUBB.

which seems to be founded on that general proposition. It is not for me to canvas that, and to say how far it ought to go. Mr. *Hall* presses me not to extend *Price* v. *Jenkins* (1), but if my view of this case is right I should not be extending it but following it exactly.

Then a more difficult argument to deal with is this, that that decision is limited to cases under the statute of 27 Eliz. I cannot myself see that on the face of the report. It was a case under that statute, and no doubt there have been cases decided since (*Ex parte Hillman* (2), *In re Ridler* (3), and I think also *Green* v. *Paterson* (4)), in which the Court seems to have treated *Price* v. *Jenkins* as applicable to cases arising under that statute, and to none other; but my difficulty is this, that I find no judgment of the Court of Appeal anywhere saying that that is so. What has been said is no doubt consistent with that view, and it may be that when they are compelled to consider the matter they may hold that view; but they do not say so; and when I find, for instance, Lord Justice *Cotton* in *Green* v. *Paterson* referring to *Price* v. *Jenkins*, not at great length, but still at sufficient length for the purposes of the case then before him, and giving some account of it, and referring to it as decided under the statute of 27 Eliz., but not saying in so many words that it is applicable to cases under that statute and to none other, I do not think that I am competent to supply those words and to say that it is applicable to no other cases. In Irish cases, where apparently the Judges are not bound by the decision of the Court of Appeal here, they have gone the other way and thought themselves at liberty to decide differently. It would not be right for me to listen to those cases, because they would have no authority here as against the decisions of our own Court of Appeal. I am told that there are text-books which point to a review of *Price* v. *Jenkins* when the opportunity occurs, and I am sorry that in this case the sum is so small. If I could put a cipher at the end of it I might express my hope that this case would go to the Court of Appeal, and that this question which has agitated the professional mind would be settled. I should

(1) 5 Ch. D. 619.
(2) 10 Ch. D. 622.
(3) 22 Ch. D. 74.
(4) 32 Ch. D. 95.

not of course apply it to any of those cases to which the Court of Appeal say it is not applicable; but that seems to me to come to this, that it is not applicable to the cases where, according to the statute or the practice of the Court, you do look into the consideration to see whether it is sufficient or not. In ordinary cases that is not the rule, and as long as there is some consideration and in the absence of fraud the Court does not inquire—does not "weigh in golden scales," as the phrase is—the consideration which has passed. I think that there was according to this decision of *Price* v. *Jenkins* (1) some consideration sufficient to make *Alfred John Tubb* a purchaser for value instead of a volunteer, and that therefore the vendors' lien will not hold as against him and those claiming under him.

Solicitor for Plaintiff: *A. H. Crowther.*
Solicitor for *Amelia B. Tubb: F. Bradley.*

C. M.

ABERGAVENNY IMPROVEMENT COMMISSIONERS *v.* STRAKER.

KEKEWICH, J.
1889
April 12, 15.

[1887 A. 1644.]

Market—Tolls—Penalties—Disturbance—Alteration by Statute—Modern Market.

The Commissioners of a town were by their Act incorporating the *Markets and Fairs Clauses Act*, 1847, empowered to set up a market and take tolls for articles sold therein.

Sect. 47 of the Local Act imposed tolls on all persons selling except on premises in their own occupation.

Sect. 13 of the *Consolidation Act* imposes penalties on all persons selling except in their own dwellings or shops:—

Held, that an auctioneer holding sales on a field in his own occupation could not be sued for disturbance of the market, though apart from the special Act that mode of sale would have been a disturbance of an ancient market.

BY the *Abergavenny Improvement Act*, 1854 (17 & 18 Vict. c. xlix.), the *Markets and Fairs Clauses Act*, 1847 (10 & 11 Vict. c. 14), except the 30th and 50th sections, was incorporated with

(1) 5 Ch. D. 619.

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that Act, and the *Abergavenny Improvement Commissioners* were empowered to hold markets and take tolls as therein mentioned (1).

By the *Abergavenny Improvement Act*, 1871, the Act of 1854 was incorporated therewith, and by sect. 46 the Commissioners might demand and take tolls in respect of the several articles mentioned in the schedule. By the schedule tolls were authorized in respect of horses, cattle, sheep, and pigs sold in or brought for sale to the cattle market therein mentioned. By other clauses tolls were to be paid on sales elsewhere (2).

The Commissioners had on Tuesday in every week held a market in *Abergavenny* for the sale of horses, cattle, sheep, and pigs, and had constructed a proper place for holding the market.

In July, 1886, the Defendant, *James Straker*, an auctioneer, had, in a field of his own at *Abergavenny* constructed a market, calling it "Mr. *James Straker's Smithfield*," or "*New Smithfield*,"

(1) The Act 10 & 11 Vict. c. 14, empowers the undertakers to open markets. By sect. 13: After the market place or place for public fairs is opened for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40*s*.

(2) Sect. 47: "If any person shall sell or expose for sale in any place within the town, except in or upon any premises in the occupation of such person and in respect of which he is or is liable to be rated under the authority of the *Improvement Acts* . . . in or upon any premises in the occupation of any other person any articles in respect of which tolls, rents, or charges are by this Act authorized to be taken in any market, the Commissioners may levy and take the same tolls, rents, and charges on all such articles as they might have levied and taken if the same had been sold or exposed for sale in such market."

By s. 48 if any person liable to the payment of any toll did not pay the same when demanded, the Commissioners might seize and detain all or any of the animals or articles in respect of which such toll was payable, and if the toll and charges were not paid within four days the Commissioners might sell the articles seized.

Sect. 50: "The Commissioners from time to time may grant licenses to any person to use during fairs any public grounds, or any private grounds which such person may be authorized to use, other than premises in the occupation of such person and in respect of which he is liable to be rated under the authority of the *Improvement Act*, for any of the purposes following:

"(1.) For exhibitions or shows:

"(2.) For public sales, whether by auction or otherwise."

and sellers of animals, sometimes through him and sometimes without him, sold animals without paying any tolls to the Commissioners. The Commissioners had attempted to levy tolls on these animals, but had found it impracticable without a breach of the peace.

The Commissioners brought this action claiming a declaration that *New Smithfield* was a disturbance of their market and an infringement on their rights, and claiming an injunction and damages.

The Defendant by his defence said that he was rated in respect of his premises and business, and was therefore within the exemption of the *Abergavenny Improvement Act*, 1871, sect. 47, and alleged that no sales had taken place on his field except through his intervention.

The Defendant counter-claimed an injunction to restrain the Commissioners from demanding tolls or stating to his customers that they would be liable to tolls and penalties if they took stock to the Defendant's field.

The Commissioners on the 10th of September, 1886, had laid an information and complaint before the justices against *Straker*, alleging that he had on another piece of land unlawfully sold sheep in respect of which toll was by the Acts authorized to be taken in the market of the Commissioners.

The justices dismissed the information and complaint, and on appeal to a Divisional Court by a special case, the determination of the justices was affirmed (1).

(1) 1887. March 23.

RUTHERFORD *v.* STRAKER.

MATHEW, J.:—

I think that our judgment here must be for the Respondent. The case is not free from difficulty; few cases are which turn on the construction of private Acts of Parliament which are sought to be blended with public Acts. We have here to say in what way sect. 13 of the *Markets and Fairs Clauses Act*, 1847, and s. 47 of the *Abergavenny Improvement Act* of 1871 are to be read together.

Now sect. 13 of the Act of 1847 provides that after the market place is open for public use every person who shall sell or expose for sale in any place within the prescribed limit except in his own dwelling-place or shop any tollable articles shall be liable to a penalty not exceeding 40s. The construction of that section in one respect is entirely free from doubt. It certainly means that a man may sell tollable articles within his own dwelling-place or shop without any liability to penalties, and without being deemed to have disturbed the market

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This was the trial of the action for disturbance.

Ambrose, Q.C., *Levett*, and *R. C. Glen*, for the Plaintiffs:—

A market is in the nature of a franchise, and the right is not created under that statute. There is an exemption therefore within that sect. 13 from the liability to toll and the liability to penalties. [His Lordship then read sect. 47 of the *Abergavenny Improvement Act*, 1871, and continued:—] Now is not the obvious intention of that section to increase the area of exemption? We are asked to put a construction upon it that it was not intended to control in any way sect. 13, but that it should be read as accumulating the liability of those who infringed sect. 13. I cannot really put that interpretation upon that section. It does no doubt very largely increase the exemption from tolls, and many of the observations which Mr. *Glen* made are fairly applicable. It goes a very long way to enable people to deprive the Commissioners of the tolls derivable from their market. But how can we give any other interpretation to the Act than the interpretation which the words demand? In lieu of the old phrase "dwelling-place or shop" we now have "premises in the occupation of such person, and in respect of which he is or is liable to be rated."

In construing those words according to their plain meaning, the intention would seem to be to give to an occupier of premises who is rated for those premises, and who therefore contributes to the local burthens, the exemption contemplated by sect. 13 with reference to those who sold in dwelling-places or shops, and who would be rated for those dwelling-places or shops. That would be the construction to which I should have come if the section stood alone; but, fortunately, as my learned Brother has pointed out, we have light thrown on that section by a later section of the Act, sect. 50. Sect. 50 when it it examined will be found to except sales on premises not in the occupation of persons selling, and not rated to him, and in respect of such sales the Commissioners are empowered to demand a license—the license prescribed by the schedule in the Act. It is impossible to suppose that under that section when the license is granted, the man who exercises the license should remain subject to the penalties pointed out by sect. 13 of the earlier Act, and it would be manifest, as it plainly is, that it could not have been contemplated that it was meant that under sect. 47, if a man should sell on his own premises, and on premises in his own occupation, being rated for those premises, he should not be in the same position as the man who is licensed. That, I think, is the true interpretation of those clauses. The decision of the justices was right and must be upheld.

CAVE, J.:—

I am of the same opinion. The *Abergavenny Improvement Act* of 1871 is not altogether easy to construe. Sect. 47 empowers the Commissioners to levy tolls on all articles which are exposed for sale in any place within the town, not the market, and not being premises in the occupation of the person selling or exposing them. Now, that being so, are the persons upon whom the Commissioners are so

cut down by a regulating Act: *Fearon* v. *Mitchell* (1). Here the Act has said that sheep and cattle may not be sold except in a

empowered to levy tolls also liable to a penalty under the *Markets and Fairs Clauses Act*, 1847, s. 13? That Act no doubt is incorporated with the *Abergavenny Improvement Act*, and applies to it, but if we can see an indication in the *Abergavenny Improvement Act* that any particular part of the general Act is not to apply, of course we must take it that to that extent and for that purpose the general Act is repealed. It seems to me it would be a very strong thing to say that the man is liable to pay the toll and is liable to the penalty as well. The penalty is imposed on the man who gets the benefit of the customers which the market or fair brings about, and at the same time evades payment of the tolls which are due to the lords of the market by selling outside the market. Now, as he is made liable to the toll, no matter whether he sells inside or outside the market, there does not seem to me to be quite the same reason for imposing the penalty as well, although I admit at the same time it is not conclusive, because, possibly, the legislature might have intended that a man should be liable to pay the toll and also should be liable to pay the penalty, but I should expect certainly to see much clearer indications of that intention than I find in sect. 47, or in any other part of the Act of 1871. Then, if those persons who are made liable to the payment of the tolls by sect. 47 are, as I think they are, exempted from penalty, it seems to me to follow also that the persons who are exempted from the tolls are also exempted from the penalty; otherwise instead of being in a better position because they are doing these things on premises in their own occupation which have been rated for the support of the market, they would be placed in a worse position, because they would not only have no means of escape from the penalty by payment of toll, but would have to pay the penalty for the contravention of the Act. That view is confirmed by sect. 50, because by sect. 50 the Commissioners may grant licenses to any person to use, during fairs, any public or private ground which he may be authorized to use other than premises in his own occupation. Now, that being so, a person who can get the authority of another person to use his land may go and get a license to sell by public auction for which he will have to pay £1. Will he be free from the penalty if he does so? I think it must be that he will be free from the penalty. It can hardly be possible that they will license a man to do an act and then the next day have him up for a penalty for doing that very thing which they licensed him to do. If that man, therefore, who gets the license is freed from the penalty, must not the persons who sell on the premises in their own occupation and in respect of which they are liable to be rated be also free? Certainly it would be outrageous, as it seems to me, if they were not. An auctioneer, having no premises of his own, gets leave to sell on some other person's premises, and gets a license for £1. An auctioneer who has got premises of his own cannot

(1) Law Rep. 7 Q. B. 690.

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man's own shop, and a man may not open a place where, whether he intends it or not, people can deal with another, as that is a market: *Goldsmid* v. *Great Eastern Railway Company* (1); *Elwes* v. *Payne* (2). Even if the case does not come under the clause as to penalties, an injunction may lie.

Rigby, Q.C., *Finlay*, Q.C., and *P. Baylis*, for the Defendant:—

This case must depend on statute: *Mayor of Manchester* v. *Lyons* (3), and a common law right is not even alleged. The Defendant may be liable to tolls and penalties, but that does not justify an action against him for disturbance. The remedy of the Commissioners, if any, is to recover tolls by distress. But he is not liable to tolls, as has already been decided by the Divisional Court.

Ambrose, in reply:—

The penalty is cumulative. The Commissioners have for the public benefit set up a market, and have had rights given them. *Mayor of Lichfield* v. *Simpson* (4) and *Couch* v. *Steel* (5) shew that the imposing a penalty does not take away a common law right to protection.

KEKEWICH, J.:—

If this were the case of an ancient market, or the case of a modern market unrestricted by statutory provisions, I should certainly hold that the Defendant had been guilty of the offence of disturbing the market, and on that ground was liable to an injunction. There are several passages in the judgments of the

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sell on his premises at all. He cannot get a license, and therefore, if he is liable to the penalty he is in an infinitely worse position than the man who gets leave to sell on some premises which are not his own. Now that seems to me to be so unreasonable that it leads me to the conclusion that persons who sell on premises in their own occupation in respect of which they are rated are not liable to a penalty. That confirms the view of sect. 47.

Finally, I come to the conclusion that the decision of the magistrates was right, and that the respondent was not liable to the penalty.

(1) 25 Ch. D. 511.
(2) 12 Ch. D. 468.
(3) 22 Ch. D. 287.
(4) 8 Q. B. 65.
(5) 3 E. & B. 402.

Court of Appeal in the case of *Goldsmid* v. *Great Eastern Railway Company* (1) which go that length. *Elwes* v. *Payne* (2) goes to shew that an auctioneer carrying on his business is doing that which, under facts otherwise concurring, is a disturbance of the market. As against that, it is said that this is not a modern market, but is an ancient market. But it has been held more than once, particularly in *Mayor of Manchester* v. *Lyons* (3), that where you have the old franchise increased in strength and character by statutory provision, the privileges of the ancient franchise are gone, and you must look to the statutory provisions only; and, therefore, I regard this as for all purposes a modern market.

The first point made by the Defendant is that there is a remedy given to the Plaintiffs under this Act, or in more than one of the Acts on the subject, and that having that one remedy pointed out by statute, they have no other and are not entitled to maintain an action for disturbing the market. There is a good deal to be said on the point, and to my mind it is a serious question whether the rule quoted from *Wolverhampton New Waterworks Company* v. *Hawkesford* (4), and followed in other cases of the same class, would be applicable here where there is no remedy given as against disturbing the market, but where, if there is any remedy at all, it is only for tolls, or for penalties in lieu of tolls. I do not propose to say any more on that question, which would require a good deal of consideration if it had to be decided in this case, because it seems to me that I ought to deal with the case on a short and simple ground which enables me to give every other ground the go-bye.

The Act of 1871 contains a section, the 47th, which has been relied on for the Defendant, and which has to be construed by the light of the 50th section of the same statute. Those two sections, in conjunction with sect. 13 of the General Act, came before a Divisional Court, consisting of Mr. Justice *Mathew* and Mr. Justice *Cave*, on a claim for penalties by these very Improvement Commissioners against this Defendant *Straker*; and the

(1) 25 Ch. D. 511.
(2) 12 Ch. D. 468.
(3) 22 Ch. D. 287.
(4) 28 L. J. (C.P.) 242.

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substance of their judgment is that *Straker*, doing then what he is doing now, namely, carrying on his business as an auctioneer, though not at that time in the same place, but in another place in the same way, was not liable either to tolls or to penalties under the Act. The question before them was whether he was liable to a penalty, and, perhaps unfortunately, as it was a claim for penalty, the matter could not be taken to the Court of Appeal. But both Judges, in giving judgment, relied upon the exemption from penalty depending on the exemption from toll. Both the learned Judges gave judgment to that effect. Mr. Justice *Mathew*, referring to the 47th section, says: "Construing those words according to their plain meaning, the intention would seem to be to give to an occupier of premises, who is rated for those premises, and who therefore contributes to the local burthens, the exemption contemplated by sect. 13 with reference to those who sold in dwelling-places or shops, and who would be rated for those dwelling-places or shops." Then he confirms that by reference to sect. 50, and points out that it would lead to an absurdity if that construction was not applied to that section. Then Mr. Justice *Cave* points it out even more clearly. He says: "If those persons who are made liable to the payment of tolls by sect. 47 are, as I think they are, exempted from penalty, it seems to me to follow also that the persons who are exempted from the tolls are also exempted from the penalty; otherwise, instead of being in a better position because they are doing these things on premises in their own occupation which have been rated for the support of the market, they would be placed in a worse position, because they would not only have no means of escape from the penalty by payment of toll, but would have to pay the penalty for the contravention of the Act." He also refers to sect. 50 as confirming that view.

Now, if the Plaintiffs are right in this action, the Defendant is not liable to a penalty for carrying on his business in this place, called "*Smithfield*"; and he is not liable to toll for carrying on his business there; the two must stand or fall together according to the judgment of the Divisional Court; and yet the very thing which the Act does not prohibit is to be made the

subject of an action for the disturbance of the Plaintiffs' market. It seems to me that it would be an absurd conclusion to say, not that there is no remedy provided by the Act, and that therefore the remedy by action at Common Law remains, but that this Defendant is specially exempt from both tolls and penalties in order that he might be stopped altogether by an action. I could not construe the statute in that way without stultifying myself in any judicial decision on the statute; and accepting, as I, of course, do, without even inquiring whether it is right or wrong, the decision of the Divisional Court, I think I am bound to decide in favour of the Defendant in this case.

Then the Defendant has a counter-claim, and the counter-claim is to restrain an interference with his business, which I hold to be a legitimate business, and one that, therefore, ought not to be interfered with. It by no means follows that because it is an interference which would justify an injunction, that it would also justify damages being given. I do not think damages have been proved here—certainly they are not capable of being assessed, because although two of the witnesses have said that they have avoided going to the Defendant's *Smithfield* because they did not wish to be mixed up in law, still it has not been brought down to a question of pounds, shillings, and pence; and it would be impossible to say that any particular amount of damage has been suffered. But I have it in evidence that these Plaintiffs not only insist upon demanding tolls from persons not attending this market, which I think they are entitled to do if they please at the continued risk of failure, but endeavour to divert persons from going to the Defendant's *Smithfield* by insisting upon their right to tolls, and, in fact, thus prevent him carrying on what I hold to be his honest occupation. What I propose, therefore, to do is, to grant an injunction to prevent the Plaintiffs by their agents, and so forth, from interfering with the conduct by the Defendant of his business as an auctioneer on the premises mentioned; and having expressed my opinion as to what is an interference, the Plaintiffs will continue to do what they have been doing at their own risk.

The Defendant having succeeded not only in the action brought

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by the Plaintiffs, but on this counter-claim also, must have all his costs.

Solicitors for Plaintiffs: *J. T. & G. F. Marshall*, agents for *Gabb & Walford, Abergavenny.*

Solicitors for Defendant: *Crowders & Vizard*, agents for *Corner & Corner, Hereford.*

C. M.

In re ESTHER WILLIAMS.
FOULKES *v.* WILLIAMS.

[1888 W. 1943.]

C. A.
1889
Feb. 2, 4.

Appointment—Special Power—Exercise—General Devise—Will not referring to Power—Wills Act (1 *Vict. c.* 26), *ss.* 24, 27 [*Revised Ed. Statutes, vol. viii., pp.* 34, 35].

The donee of a special power by will to direct trustees to pay to his wife for life the income of settled real estate held by them on trust for sale and conversion, having no real estate of his own, by his will devised and bequeathed all his real and personal estate to his wife absolutely.

The will contained no reference to the special power or to the property comprised therein :—

Held (affirming the decision of *Kay*, J.), that the general devise and bequest in the will did not operate as an exercise of the power.

In re Mills (1) approved.

THIS was an appeal from an order of Mr. Justice *Kay* made in Chambers on the 29th of June, 1888.

Esther Williams, a widow, who died in July, 1887, by her will, dated the 1st of May, 1878, *inter alia*, devised a freehold messuage in *Rhyl* to trustees, their heirs and assigns, upon trust to permit her son, *W. R. Williams*, to receive the rents and profits thereof during his life, and from and after his death upon trust to sell and convert the same into money, and to stand possessed of the proceeds of the sale and conversion thereof, "which, after payment of the costs and expenses, are to be invested as hereinafter directed, upon trust, if the said *W. R. Williams* shall by his last will and testament so direct (but not otherwise), to pay the income or interest of the same, or any part thereof, to any wife of the said *W. R. Williams* for and during the term of her natural life, or any lesser term, and from and after the decease of such wife or the decease of the said *W. R. Williams*, in case he shall not have made any appointment or directions for his wife's benefit as before mentioned, or so far as such appointment shall not extend;" then upon certain trusts for the benefit of his children and grandchildren as he should by will appoint, and in default

(1) 34 Ch. D. 186.

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upon trusts for the benefit of his children or child. The will also contained powers for the trustees to invest the trust premises in certain stocks, funds, and securities, or in the purchase of freehold hereditaments.

W. R. Williams survived his mother, and died on the 9th of August, 1887, having on the 8th of August, 1887, made the following will:—

"This is the last will and testament of me, *William Robert Williams*, of No. 18, *West Parade, Rhyl*, in the county of *Flint*. I give, devise, and bequeath all my real and personal estate whatsoever and wheresoever unto and to the use of my dear wife, *Lucy Ellen Williams*, absolutely, and I appoint her sole executrix of this my will."

W. R. Williams was not entitled either at the date of his will or of his death to any real estate, except so far as he was entitled to that which was comprised in the power of appointment contained in his mother's will.

After his death the trustees of the will of *Esther Williams* applied to the Court by way of originating summons against the widow and child of *W. R. Williams*, to have it determined whether or not his will operated as a good and valid exercise of the power of appointment in favour of his wife given to him by the will of his mother.

It was held by Mr. Justice *Kay* in Chambers, upon the authority of *In re Mills* (1), that the will of *W. R. Williams* did not so operate.

The widow appealed.

Bardswell, for the Appellant:—

The general devise and bequest in the will of *W. R. Williams* operated as a good exercise of the power contained in his mother's will.

In re Mills (1), upon which the judgment of the Court below was founded, if correctly decided, is distinguishable upon the ground that the donee of the power in that case included in the disposition he made by his will persons who were not objects of

(1) 34 Ch. D. 186.

the power, and that he lived for a year and a quarter after the date of the will, so that there was a considerable period during which he might have acquired other real estate.

The testator here made his will the day before his death, when he had no real estate of his own, and as his paramount intention to benefit his wife is obvious on the face of the will, he must have meant to dispose of this property. Under the old law, before the *Wills Act*, a general devise of real estate by a testator who had no real estate of his own would pass real estate over which the testator had a power of appointment: *Standen* v. *Standen* (1); *Denn* v. *Roake* (2). And "the intention of the *Wills Act* was to extend and not to narrow the operation of devises": *Lake* v. *Currie* (3). A general devise to an object of a limited power is a good exercise of the limited power, and the widow is entitled to a life interest under this devise: *In re Teape's Trusts* (4). The trust for conversion in this case was for the convenience of administration, and under a power in the will the proceeds were liable to be reinvested in freehold land. Moreover, the Court will look at the property as it existed at the date of the will, *i.e.*, as land: *Chandler* v. *Pocock* (5).

[He also referred to sects. 24 and 27 of the *Wills Act* (1 Vict. c. 26).]

Russell Roberts, for the Respondents, was not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay*, in which he declared that a general devise and bequest by the son of the testatrix in this action did not operate as an effectual exercise by him of a power under the will of his mother.

[His Lordship then referred to the two wills in question, and continued:—] Now, the son does not in terms give his wife a life interest, and the question is whether or not, under the circumstances, this general devise in his will operates as an effectual appointment to her for her life.

(1) 2 Ves. 589.
(2) 5 B. & C. 720, 731.
(3) 2 D. M. & G. 536, 548.
(4) Law Rep. 16 Eq. 442.
(5) 15 Ch. D. 491; 16 Ch. D. 648.

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Now, can we say that there is on the face of his will any sufficient evidence of an intention on his part to exercise this power? It is a special power, and sect. 27 of the *Wills Act*, which deals with general powers of appointment, does not apply. There is no reference by the testator, who is the donee of the power, to the will which gave the power or to any property taken under that will.

The 24th section of the *Wills Act* provides that every will is to be construed, with reference to the real estate comprised in it, to take effect from the death of the testator. Under that section the will would operate upon any real estate which the testator might have at the time of his death. He had no other real estate, and it is said that he must have intended to execute the power, and that to hold that he had not done so would be to cut down the will. That argument might have held good before the *Wills Act*, because the testator had not any real property upon which his will could operate except the real property which was subject to the power. But the reason which, under the old law, might have made it effectual, fails, because since the *Wills Act* we never can tell that the testator may not after the date of his will acquire fresh real estate before his death, and we cannot in any particular case speculate upon the improbability of his doing so. Then again, it is said that this view is contrary to the opinion expressed by Lord *St. Leonards* in *Lake* v. *Currie* (1). But that is not so. It is true that in that case Lord *St. Leonards* said (2), as to the *Wills Act*, "The intention was to extend and not to narrow the operation of devises, and therefore to hold that cases which before the statute would have been an execution are not so now, would be contrary to the whole scope of the Act." But in *Lake* v. *Currie*, the Lord Chancellor was dealing with the case of a general power of appointment, and those observations must be read with reference to sect. 27. The Lord Chancellor was not dealing with the question of what would be the result in a case like this.

In my opinion the decision in *In re Mills* (3) was right, and this appeal fails.

(1) 2 D. M. & G. 536, 548. (2) 2 D. M. & G. 548.
(3) 34 Ch. D. 186.

LINDLEY, L.J. :—

I am of the same opinion. It appears to me that after the very careful way in which Mr. Justice *Kay* dealt with the matter in *In re Mills* (1) there is very little left for us to decide. The same reasoning applies to the present case, although the facts are somewhat different. We must bear two things in mind. First, that sect. 27 only applies to a general power of appointment, as to which a general devise operates as an exercise of the power, unless there is some indication in the will of a contrary intention. Secondly, that, as regards special powers, the old law applies, which is that you must find some indication, either by reference to the power or by reference to the property, of an intention to exercise the special power. Anything which shewed that the testator had the power in his mind would be enough. But if you cannot find anything to shew that the testator had the special power in his mind, it would be straining language to say that the devise would be an exercise of that power. Here the power is a very special and peculiar one. [His Lordship read it and continued :—] What you have to do, is to get some indication of intention from the will of the testator which amounts to a direction on his part to the trustees to pay the income of the fund to his wife, and anything which will enable you to get at that will do. But so far from finding anything to shew that he had any such thing in his mind, you find nothing of the kind. It is true that he had no real estate of his own. But the Court cannot, from that fact only, come, by any process other than guessing, to the conclusion that the testator intended to exercise this special power.

LOPES, L.J. :—

To give effect to the will of *W. R. Williams* in the direction required, the Court must be satisfied of the existence of an intention on his part to exercise this special power. Looking at the will, I cannot find anything which leads me to the conclusion that the testator had any such intention.

Looking at the will, I come to the conclusion that he had no

(1) 34 Ch. D. 186.

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intention beyond a general desire to do all he could in favour of his wife. I agree with the decision in *In re Mills* (1); and I think that the decision in the present case was right, and that this appeal must be dismissed.

COTTON, L.J.:—

I think we may give the trustees their costs out of the estate; but there will be no other order as to costs.

Solicitors: *Hamlin, Grammer & Hamlin*, agents for *J. P. Cartwright, Chester; Kennedy, Hughes & Kennedy*, agents for *W. R. Williams, Rhyl.*

W. W. K.

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STIRLING, J.
Nov. 30; *Dec.* 7.
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March 26; *April* 8.

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Company—Shares—Issue at a Discount—Ultrà vires—Dealing with Shares by Holder—Acquiescence—Repudiation—Rectification of Register—Mistake of Law—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 23, 35 [*Revised Ed Statutes, vol. xiv., pp.* 207, 210]—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

A company, empowered by its articles of association to issue new shares at a discount, in December, 1886, offered to allot to Mrs. *S.*, a shareholder, any portion of a new issue of 5000 £5 shares at the price of 10*s.* per share. Mrs. *S.* applied for 673 of these shares. They were allotted to her by the company in January, 1887. She paid the 10*s.* per share, was registered as the owner of 673 fully paid-up shares of £5 each, and on March 25th she received a certificate for them accordingly. At the time of the issue of the new shares and down to December, 1887, it was believed that the issue of these new shares at a discount of £4 10*s.* per share was not *ultrà vires* on the part of the company.

In March 30, 1887, Mrs. *S.* sold 150 of these shares as fully paid up to a purchaser for value without notice that they had been issued at a discount. On the occasion of this sale she surrendered the certificate for the 673 shares, and received back a fresh certificate for the remaining 523 shares.

In April and August, 1887, she attempted to alienate some of the 523 shares. In December, 1887, the validity of the issue of shares at a discount was doubted by the Court of Appeal in the case of *In re Addlestone*

(1) 34 Ch. D. 186.

Linoleum Company (1). In January, 1888, Mrs. *S.* applied for, as a shareholder, and sent in to the company proxies in respect of the 523 shares. On February 2, 1888, Mrs. *S.* wrote to the company that she had been advised that the issue of new shares at a discount was illegal, and that if the directors attempted to make a then proposed further issue of new shares at a discount she would apply to restrain them. In June, 1888, Mrs. *S.* required the company to return the amount she had paid for the 673 shares, and to remove her name from the list of shareholders in respect of them.

In September, 1888, she took back from the purchaser the 150 shares she had sold, in exchange for 150 fully paid-up shares. In November, 1888, she applied to the Court to strike out her name from the list of shareholders in respect of the 673 shares:—

Held, by *Stirling*, J., that the contract to take the 673 shares at a discount was void, and that Mrs. *S.* was entitled to relief except as to the 150 shares taken back, which having been repurchased from a purchaser for value without notice, must be treated as fully paid-up shares.

On appeal by the company as to the 523 remaining shares:—

Held, by the Court, in allowing the appeal, that although the contract under which she took the shares could not have been enforced against her, the Respondent having, with knowledge that her name was on the register as the holder of the shares, dealt with them as if she had been a member of the company in respect of them, had assented to keep them, and was liable under the 25th section of the *Companies Act* of 1867 to pay the whole amount of them in cash, notwithstanding her misapprehension of the legal effect of the contract she had originally entered into.

Arnot's Case (2) distinguished.

APPEAL from Mr. Justice *Stirling*.

This company was registered under the *Companies Acts* on the 5th of January, 1886. Its nominal capital was £30,000, divided into 6000 shares of £5 each, and by the articles of association the company was empowered to increase its capital by the creation of new shares, which were to be issued upon such terms and conditions as the directors should determine, and with regard to its shares generally it was provided in article 4 that the shares of the company "shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times as the directors think fit, and either at a discount, premium, or otherwise."

The whole of the original 6000 shares were allotted as fully paid-up shares, and Mrs. *Hannah Sandys* was the holder of 1000 of them.

(1) 37 Ch. D. 191. (2) 36 Ch. D. 702.

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On the 29th of November, 1886, a resolution was passed by the company (which was afterwards duly confirmed) that its capital should be increased by the creation of 5000 shares of £5 each, and a contract in writing with reference to such issues was duly registered under the *Companies Act* 1867, sect. 25.

On the 22nd of December, 1886, Mrs. *Sandys* received a circular from the secretary of the company stating that the directors had concluded an arrangement to allot the whole of the 5000 additional shares to Mr. *Henry Hoare* at 10*s.* a share; but that by the terms of this agreement they were in a position to offer any shareholder desiring to invest, any portion of the additional shares at this price.

Shortly after the receipt of this circular, Mrs. *Sandys* applied for 673 of the new shares, and she paid £168 5*s.*, being the sum of 5*s.* per share payable as deposit upon an application for that number of shares, to the company's bankers on the 11th of January, 1887.

On the 14th of January, 1887, Mrs. *Sandys* received a letter of allotment, informing her that in compliance with her application the directors had allotted her as nominee of Mr. *Hoare*, in accordance with his agreement with the company, 673 shares of £5 each.

On the 24th of March, 1887, Mrs. *Sandys* paid the further sum of £165, being the remaining 5*s.* due upon the shares. She was duly registered as the holder of 673 fully paid-up shares, and on the 25th of March she received a certificate for them.

At the time of the issue of these new shares it was believed that it was not *ultrà vires* on the part of a company to issue its shares at a discount, unless expressly prohibited from so doing, and no doubt appeared to have been entertained as to the power of this company to make such an issue until after the judgments delivered by the Court of Appeal in *In re Addlestone Linoleum Company* (1) as hereinafter mentioned.

There was nothing on the face of the certificate for the new shares to shew that they were issued at a discount of £4 10*s.* per share, or at any discount, and on the 30th of March, Mrs. *Sandys* sold 150 of them for £225 to a Miss *Watling*, who took the

(1) 37 Ch. D. 191.

shares without notice that they had been issued at a discount and under the belief that they were fully paid-up shares.

After the sale, Mrs. *Sandys* duly surrendered the certificate for the 673 shares, and applied for a fresh certificate, and on the 16th of April she received from the company a fresh certificate for the 523 shares remaining in her name.

In the months of April and August following, Mrs. *Sandys* executed transfers of certain of the 523 shares remaining unsold, but such transfers were never registered.

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On the 7th of December, 1887, the Court of Appeal delivered judgments in *In re Addlestone Linoleum Company* (1), which contained *dicta* throwing doubt upon the validity of the issues of shares at a discount.

In January, 1888, the directors of the company proposed to issue 7000 additional shares at a discount, and sent to Mrs. *Sandys*, amongst other shareholders, notice that a meeting would be held at which the question of this issue would be considered.

Mrs. *Sandys* being desirous of voting against the proposed new issue, applied to the secretary of the company for, and obtained proxies in respect, amongst others, of the 523 new shares, which she signed and sent in for the purpose of being used at the meeting. Such proxies were not however actually used as they arrived too late. The meeting was held on the 26th of January, and a resolution authorizing the new issue was passed.

On the 2nd of February, 1888, Mrs. *Sandys* wrote to the secretary as follows:—"Counsel has advised me that you cannot legally issue any new shares at a discount, and that if the directors sell or otherwise dispose of any shares except for par value, they will be *ultrà vires*, and the allottee must pay up the full nominal amount to the company. I therefore beg to inform you that should the directors attempt to issue the proposed new shares otherwise than for par value, application will be made to restrain them from doing so."

On the 5th of June, 1888, Mrs. *Sandys* again wrote to the secretary as follows:—"With reference to the recent decision of the Court of Appeal in the case of the *Almada and Tirito Company*, by which it was held that the issue of shares at a discount

(1) 37 Ch. D. 191.

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is *ultrà vires*, as 'nothing will diminish or extinguish this liability but payment in full,' I request you to inform me whether your company is prepared to return me the amount which I paid for the shares allotted to me per your letter of the 14th of January, 1887, and also to remove my name from the list of shareholders so far as relates to those shares."

In September, 1888, Mrs. *Sandys* took a retransfer from Miss *Watling* of the 150 shares, which she had transferred to that lady, and in lieu thereof transferred to her 150 of the 1000 fully paid-up shares which she originally held.

Further correspondence then took place between Mrs. *Sandys* and the company upon the subject of her letter of the 5th of June, and on the 15th of November she served the company with notice of motion under the *Companies Act*, 1862, sect. 35, that the register might be rectified by striking out her name in respect of the 673 shares issued at a discount, and that the sum paid by her to the company in respect of such shares might be repaid to her.

This motion came on for hearing before Mr. Justice *Stirling* on the 30th of November, 1888.

Buckley, Q.C., and *John Chester*, for the motion:—

The question of contract is the basis of the Applicant's contention that her name should be removed. The contract was absolutely invalid. It was not voidable, but void. Mrs. *Sandys* was to take shares on which there was a liability to pay £4 10*s*. each, but which under no circumstances was she to pay. The Lords Justices, however, have held that it is quite impossible for a company limited by shares to bind itself so that any person shall pay less in money for the shares than their nominal value: *In re Almada and Tirito Company* (1); *In re Addlestone Linoleum Company* (2). It cannot be contended that there was a valid contract on one side and an invalid one upon the other. Being invalid, as the law stands, it cannot be set up otherwise than by making an entirely new contract. Mrs. *Sandys* was wrongly put on the register, and it will be for the company to shew that she was not improperly put on it. The lapse of time is not a bar to taking the name off the register.

(1) 38 Ch. D. 415. (2) 37 Ch. D. 191.

Beale, Q.C., and *Carson*, for the Company:—

Mrs. *Sandys* and the company were competent to enter into this contract; at all events she did certain acts which, it is submitted, made a good contract if there was not one before, but in fact, there was a contract on both sides. However that may be after such a long lapse of time it is too late to come to the Court for the removal of her name.

[STIRLING, J., referred to *Clough* v. *London and North Western Railway Company* (1).]

The Court has no power to order any payment to Mrs. *Sandys*, nor can a shareholder ask to have the money paid back as against the other shareholders. If there was a mistake made it was mutual. As to the 150 shares which Mrs. *Sandys* has dealt with the company oppose her application altogether. There can be no return of any money in respect of them, as to the rest of the shares before any order can be made for a return of any money there should be an action against the company to recover as for money had and received. It is submitted that the contract was voidable and not absolutely void, and that the application should be refused.

Buckley, in reply:—

How can the 150 shares stand upon a different footing from the others? Mrs. *Sandys* transferred them as fully paid-up to a purchaser, but it cannot be contended that the effect of what was done was to make a new contract between her and the company: *Barrow's Case* (2); *Burkinshaw* v. *Nicolls* (3), but it may be contended that those cases do not apply to a transaction of this sort. It is submitted that the Court has under sect. 35 of the *Companies Act*, 1862, jurisdiction to award a sum for damages.

1888. Dec. 7. STIRLING, J.:—

In this case the application is by Mrs. *Sandys*, who desires to have her name taken off the register in respect of a considerable

(1) Law Rep. 7 Ex. 26. (2) 14 Ch. D. 432.
(3) 3 App. Cas. 1004.

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number of shares, and to have a return made to her of the 10*s.* per share which she paid to the company in respect of the allotment of them to her.

It appears that at the end of 1886, or the beginning of 1887, she entered into a contract with the company, which was in effect that they should allot and issue to her 673 shares in the company of £5 each as fully paid-up in consideration, simply, of the payment of 10*s.* per share. Now that contract is substantially the same as the contract which came before the Court of Appeal for consideration in the recent case of *In re Almada and Tirito Company* (1); and the first question which I have to consider is what was the decision of the Court of Appeal as to the nature of such a contract.

It appears to me that in that case it was decided that it is beyond the powers of a company registered under the *Companies Act*, 1862, to enter into such a contract, and for the purpose of shewing that I shall refer very shortly to a few passages in the judgment of Lord Justice *Cotton*. In the first place the learned Judge considered what was the effect of the Act of 1862, and having commented upon certain sections, he said (2): "in my opinion, looking to those sections of the Act of 1862 only, it is perfectly clear that an agreement that you should pay 2*s.* on the shares you take, and not pay up the other 18*s.*, which would make up the amount in money fixed by the memorandum of association, would be entirely *ultrà vires.*" Therefore his Lordship came to the conclusion that under the Act of 1862 such an agreement was entirely *ultrà vires.* The learned Judge then went on to discuss the effect of the *Companies Act* of 1867 (3), and having done so, said (4): "In my opinion the 25th section in no way intended to provide for any portion of the money value of shares not being paid, but only provided that it might be paid by money value as well as by mere money. I must hold, therefore, that there was no power at all to issue shares on the footing of this memorandum." That seems to me to be perfectly clear. The Lord Justice *Cotton* held that the contract in that case, which was substantially the same as the one I

(1) 38 Ch. D. 415.
(2) Ibid. 421.
(3) 38 Ch. D. 422.
(4) Ibid. 424.

have to consider in the present case, was beyond the powers of the company to enter into. Lord Justice *Fry* and Lord Justice *Lopes* expressed an agreement in general terms with the reasons of Lord Justice *Cotton*. Certainly they expressed no dissent whatever from that position. Then if the contract be *ultrà vires* of the company it is not merely voidable, but it is absolutely void, and as Lord *Cairns* said in a well-known case it is incapable of being ratified by the whole of the shareholders of the company even if they were assembled in one room and voted to that effect. But then it was contended, and a passage in the judgment of the Lord Justice *Cotton* was pointedly called to my attention, that that could not have been the view of the learned Judge, because he said (1) :—" The result therefore must be that, as the company has put these gentlemen on the list of shareholders, and they did nothing which in any way was an assent to that being done, the contract being one which the company could not carry into effect, we must make an order that their names be removed from the register." It was said that, inasmuch as the Lord Justice stated that "they did nothing which was in any way an assent to that being done," he was of opinion that the contract was voidable only and not void, but in my opinion that was not the meaning of the learned Judge. It is obvious that the company, and the person on the register might enter into an express contract that notwithstanding everything which had passed before, the person on the register should continue to hold the shares on the proper terms upon which the company could issue them, viz. that he, the registered holder, should be liable for payment of £4 10*s.* per share. If that was expressly agreed upon not a word could be said against it, but even if no express agreement were come to acts might be done and dealings might take place between the company and the registered holder from which the Court would be bound to infer that an implied agreement to that effect had been come to, and I think it was to such a case as that that the Lord Justice *Cotton* meant to refer in the passage which was relied upon on behalf of the respondent. I come to the conclusion, therefore, that following that case, I must treat the contract as void.

(1) 38 Ch. D. 424.

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Then the question arises as to what the effect of delay might be in applying to have a name removed from the register of shareholders. It was contended that time could have no effect at all. Stated in that broad way I am not prepared, as at present advised, to assent to the proposition. For the reasons which I shall mention presently I do not think it necessary to decide it in the present case, but by way of shewing what my view is I may refer to a few words which occur in the judgment of Lord Justice *Mellish* in *Wynne's Case* (1). In that case the person on the register had made a proposal to the company to take shares on certain terms which he specified. The company did not accept these terms simply, but sent what was a counter proposal, and the Court came to the conclusion that under these circumstances no binding contract had ever been come to between the parties; but that in making the counter proposal the company said in effect: We shall put you on the register on the footing of the terms which we indicate in this letter, and which the Court held had never been accepted by the person who was put upon the register. Now under those circumstances, having come to that conclusion, the Lord Justice *Mellish* said (2): "The whole case as put against Mr. *Wynne* is that he was told that he was on the register, and that he did not object to that in time. It is not necessary to lay down in this case that if a man is told he is on the register, when he never sent any offer or proposal at all, he is not obliged to answer that; for I think that if, as in this case, a person makes some proposal, and he knows that there is some mistake, it is his business, within a reasonable time, to take some steps." Then he said (3): "But we have to look at all the circumstances," and then he discussed the circumstances in that particular case, and came to the conclusion that the delay was not sufficient in that case to preclude Mr. *Wynne* from saying that he was improperly put on the register. Then he added this: "There is a considerable distinction, I apprehend, between a voidable contract which is capable of being avoided and a void contract which is capable of being affirmed. Here there is no contract at all, and the most you can say is that he has notice

(1) Law Rep. 8 Ch. 1002. (2) Law Rep. 8 Ch. 1015.
(3) Law Rep. 8 Ch. 1016.

that they are going to treat him as a shareholder, and by not objecting to it he may have ratified and assented to it." So that the learned Judge came to the conclusion that in such a case as that a shareholder might ratify and preclude himself from having his name taken off the register. It is not necessary at all to consider, and Lord Justice *Mellish* in that case did not consider, what were the limits of time within which that need be done. As regards voidable contracts the limits of time were considered and fully explained in the case of *Clough* v. *London and North Western Railway Company* (1), to which I referred during the argument, and it is sufficient, as it appears to me, to say that the limit of time within which the ratification was to take place cannot possibly be narrower than it would be if a contract were voidable and not void. What occurred here? It is not pretended that before February of the present year either party knew the position, at all events there is no evidence of it; but it does appear that in the beginning of the present year a fresh issue of capital by the company on the same terms was in contemplation, and that Mrs. *Sandys* objected. On the 2nd of February, 1888, she wrote a letter: "Sir,—Counsel has advised me that you cannot legally issue any new shares at a discount, and that if the directors sell or otherwise dispose of any shares except for par value they will be acting *ultrà vires*, and the allottee must pay up the full nominal value to the company. I therefore beg to inform you that should the directors attempt to issue the proposed new shares otherwise than for par value, application will be made to restrain them from doing so."

So that it appears that the mind of the writer of the letter was not directed to the particular shares which she herself held, but to a fresh issue which was about to take place. Now upon that letter being sent to the company matters rested as they were on the 2nd of February except with respect to the 150 shares which I shall deal with presently, and which stand on a totally different footing. Nothing was done by either party down to the time when Mrs. *Sandys* took out this summons to have her name struck off the register. If upon receiving that letter the company had said: Very well, you have been well advised; we assent to the law as

(1) Law Rep. 7 Ex. 26.

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you state it in your letter; you are in the same position, you have been put on the register and we shall keep you there, and shall insist upon your liability to pay the £4 10*s.* which remains due on each of your shares;—then, it seems to me, the case would have been very similar to that which was put by Lord Justice *Mellish* in *Wynne's Case* (1), and it would have been obligatory on Mrs. *Sandys*, if she desired to avoid this liability, to take proper steps for the purpose of having her name put off the register, but it is to be observed that here the company took up no such position, and both parties ought to have an opportunity of deliberating as to what position they will take. Neither of them did anything, and having regard to the fact that the letter was not directed to the shares in question, but to the proposed issue of new shares, it is my opinion that between the 2nd of February and the beginning of November, when this notice of motion was given, there was not a sufficient lapse of time to enable me to come to a conclusion that both parties entered into a fresh agreement that the shares should be taken on other terms than those upon which they were originally allotted. I hold, therefore, that as regards the 673 shares, apart from the question as to the 150, Mrs. *Sandys* is in the right, and is entitled to have her name taken off the register.

Then the next question which I have to consider is whether she is entitled to a return of the 10*s.* per share which she has paid. That is claimed under sect. 35 of the *Companies Act*, 1862, which provides that "the Court may . . . . if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained . . . ."

Now what will be the position of Mrs. *Sandys* under the order which I am about to make? If I simply direct her name to be taken off the register and leave the matter there, she will be in this position, that she has paid the 10*s.* to the company and has got nothing whatever from the company. It seems to me that in that case, speaking not in technical but in popular language, she will have sustained damage, and the question is whether under the

(1) Law Rep. 8 Ch. 1002.

section I am at liberty to order the company to make good that damage to her. It was said that if an action were brought at law it would not be an action for damages at all, but an action as for money had and received; but that is to look at the case in a most narrow and technical manner. I am not bound to consider whether at law a count could be framed upon which the Applicant in this case would be entitled to recover the money as damages. I think that what was meant by "damages sustained" are damages in the broad and popular, and not in the narrow, and technical sense used with reference to an action at law. I do not say there is binding authority, but there are *dicta* of the Court of Appeal which justify me in coming to that conclusion. In *In re Addlestone Linoleum Company* (1) Lord Justice *Cotton* said (2): "When these shareholders, supposing the contract to have been a contract to give them fully paid-up shares, got shares which in the eye of the law were not fully paid up, they had a right to say: 'You have given us something quite different from what we agreed for, take us off the register,' and when that had been done, they might have made a further claim for damages if they had sustained any." The Lord Justice appears there to have said that they might claim damages after being taken off the register. Then in the case of *In re Almada and Tirito Company* (3) Lord Justice *Cotton* said (4): "We might probably direct payment of such damages as we may think right; but there being no question raised on that point, the order will be to take them off the register of shareholders and to return to each of them the 1*s.* per share which they have paid." There is no decision of the Court of Appeal, but having regard to those two *dicta*, I propose to make an order for the return of the 10*s.* per share.

Then, as regards the 150 shares, they stand on a totally different footing. It appears that Mrs. *Sandys* prior to February of this year sold them for value, and transferred them to the purchaser as fully paid up. Upon the doctrine laid down in *Burkinshaw* v. *Nicolls* (5) the purchaser would be entitled, being a purchaser

(1) 37 Ch. D. 191.
(2) Ibid. 205.
(3) 38 Ch. D. 415.
(4) Ibid. 424.
(5) 3 App. Cas. 1004.

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for value without notice, to hold the shares as fully paid up. Then this happened: when her own position was brought to her notice she went to the purchaser and said that a difficulty had arisen. There was a question whether the shares were not liable for the £4 10*s.* which was unpaid upon them, and she made an arrangement with the purchaser by which upon a transfer to her of 150 shares as to which there was no question at all, Mrs. *Sandy's* got back the 150 shares which she had transferred to the purchaser. Upon the authority of *Barrow's Case* (1) she would be entitled to treat those as fully paid-up shares, claiming the right of the purchaser for value without notice to whom she originally transferred them. It appears that in the case of *In re London Celluloid Company* (2) the ground of the decision in *Barrow's Case* was doubted by one of the members of the Court of Appeal, but the Court did not overule it. It is a decision of the Court of Appeal, and remains binding on me until it be overruled. Therefore I propose to follow it on this occasion, and to say that Mrs. *Sandys* has not made out a case for having her name taken off the register in respect of 150 shares. I ought to add that independently of *Barrow's Case* I should hesitate long before I made an order for taking her name off if I were satisfied that she was under any liability. Therefore as regards the 150 shares I make no order.

THE COURT being of opinion that Mrs. *Sandys* has taken a transfer of the 150 shares from the purchaser for value without notice, no order as to them; as regards the 523 shares Nos. 8711 to 9233, the order will be to rectify the register by striking her name off and order repayment to her of the sum £261 10*s.*, being 10*s.* per share upon them.

Both parties having been *in pari delicto* there will be no order as to costs.

T. F. M.

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From this decision the company appealed except as to the 150 shares repurchased from Miss *Watling*. The appeal came on for hearing on the 26th of March, 1889.

(1) 14 Ch. D. 432. (2) 39 Ch. D. 190.

Beale, Q.C., and *Carson*, for the Appellants:—

Admitting that the issue of the shares at a discount was *ultrà vires*, we contend that the contract between Mrs. *Sandys* and the company for taking the shares was not absolutely void, but voidable only, and that by her conduct she confirmed it.

By acts of ownership, such as sales, and attempts to sell and to vote in respect of these shares, Mrs. *Sandys* so dealt with them after they were allotted to her, and after she knew that her name was on the register in respect of them, as shew her assent to remain on the register and an agreement on her part to accept the shares upon the terms of paying for them in full. So she cannot now repudiate the shares, but must remain on the register and pay the full amount of the shares: *Alabaster's Case* (1); *Kincaid's Case* (2); *Wynne's Case* (3); *Perrett's Case* (4); *Pagin and Gill's Case* (5); *In re Addlestone Linoleum Company* (6); *In re Almada and Tirito Company* (7).

[LINDLEY, L.J., referred to *Andress' Case* (8); *Black & Co.'s Case* (9).]

Moreover, supposing her to have been originally entitled to relief, she is now precluded from demanding it by reason of delay. After the decision in *In re Addlestone Linoleum Company* she tried to vote in respect of these shares.

Both parties acted under a mistake of law. The company gave her the shares which she applied for on the terms which were agreed on; but both parties were ignorant of the legal consequence of their action. It is therefore not a case in which either party could claim damages.

Buckley, Q.C., and *John Chester*, for the Respondent, Mrs. *Sandys*:—

There never was any contract on the part of Mrs. *Sandys* to take shares on which she was to pay the full amount of £5, nor any contract at all except to take shares at a discount of £4 10*s*.

(1) Law Rep. 7 Eq. 273.
(2) Ibid. 2 Ch. 412.
(3) Ibid. 8 Ch. 1002.
(4) Ibid. 15 Eq. 250.
(5) 6 Ch. D. 681.
(6) 37 Ch. D. 191.
(7) 38 Ch. D. 415.
(8) 8 Ch. D. 126.
(9) Law Rep. 8 Ch. 254.

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per share. She first had notice of her alleged liability on the 2nd of February, 1888, and the registration, the dealings, and the transfer which are relied on by the Appellants, as evincing an agreement to accept shares upon the terms of payment in full, all took place before that time, and at a date when there was no contract at all except an invalid one, and she had not got such shares as she intended to take. Subsequently to the 2nd of February, 1888, there was no act of ownership, no confirmation or adoption, and no assent to any new contract to take shares without discount, or to any alteration of the original contracts, and there is repudiation within a reasonable time: *Beck's Case* (1); *Arnot's Case* (2); *In re Almada and Tirito Company* (3).

COTTON, L.J. (after stating the facts of the case, continued):—

In my opinion the order of the Court below was wrong. It is contended here that the Respondent never agreed or assented to pay £4 10*s.* on these shares, and that all she contracted to do was to take the shares on payment of 10*s.* each only. If she had never been registered and had not recognised the fact of her being registered, the company could not have forced her to take the shares: and if the shares had been put into her name without her knowledge and without her having assented to any contract other than a contract to take shares on payment of 10 per cent. only, she would have been entitled to require the company to take her name off the register, and the Court would have removed it if it had not been taken off by the company. But she has in fact assented to her name being on the register in respect of these 523 shares. I doubt whether the mere fact of her selling a considerable number of these shares would not be an assent as regards the rest of them, but there are here other acts of ownership, and by obtaining proxies she acted as the registered owner of these shares. It is true that she never actually entered into any fresh agreement to pay the £4 10*s.* a share. Her liability to pay the £4 10*s.* does not depend on the agreement, but upon the obligation imposed upon her by the 25th section of the Act of

(1) Law Rep. 9 Ch. 392. (2) 36 Ch. D. 702.
(3) 38 Ch. D. 415.

1867. As soon as she assented to being put on the register in respect of these shares, the law, independently of contract, threw upon her the liability of paying off the whole £5 which was the nominal amount of these shares. It is a mistake therefore to consider this case as if it depended upon her having entered into a contract to pay something smaller than the full amount of £5 payable on the shares. If she is entitled to be relieved from the assent, and the implied contract which has arisen from that assent, she then stands relieved; but she is not entitled to be relieved from that assent and the implied contract arising therefrom, simply because she made a mistake as to the general law of this country. I have no doubt she supposed that she could get a £5 share by paying 10*s.* only; and previously to the decision of this Court it was a thing which it was considered could be done, and which often was done by companies who, I suppose, were in want of money; but she is not entitled to be relieved in consequence of her or her advisers having made a mistake as to what would be the consequence of her having these shares in her name. If she assented to have these shares in her name, that is all that is required in order to make her liable as a member, because that is so provided by the 23rd section of the Act of 1862. The liability to pay the £4 10*s.* arose, not on any contract on her part, but simply because the law throws upon her that obligation and that liability.

But then it is said that there are cases which she can rely upon; and *In re Almada and Tirito Company* (1) is referred to. What was that case? In answer to an offer made by the company, a man had made an application to take certain shares at a discount, and in fact his name was put on the register; but he never assented in any way to his name being on the register, and as soon as ever he found that his name was in fact on the register he applied to this Court to be relieved from what had been done by the company under the contract, which was one that could not be enforced, and which did not give the company any right so long as the matter still remained in contract only, to put him on the register. Therefore there was wanting in that case the material point here, namely, the assent of the shareholder to her

(1) 38 Ch. D. 415.

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name being on the register in respect of these shares. Then *Beck's Case* (1) was referred to; but the mistake on which the applicant was there relying was not a mistake in law, but a mistake in fact. *Beck* had applied to have shares allotted to him on certain terms, and the directors had allotted the shares to him on different terms. The Lords Justices held that, although *Beck* did ask for a certificate of the shares after he had received the notice of allotment on those different terms, yet he could not be taken to have given his assent to the new terms, the reasonable inference being that he had asked for the certificate of the shares in order to find out the real truth. If there had been an application by him, and an allotment following the terms of his application, of course there would have been a contract, and he would have been rightly put on the register; but the application being made by him in one set of terms and the allotment being in another set of terms, and the applicant not knowing until he inquired whether they were different or not from the terms he had asked for, there was a mistake in fact, and it was held that he ought not to be bound when in fact there was no contract by both parties agreeing to the same terms. If there had been a mistake of the general law of the country, he could not have been relieved. But what the Lords Justices held was, that he was entitled to have his name struck off the register because he had been put on under a contract entered by him under a mistake in fact, of which he was entitled to have the benefit.

In this case, in my opinion, the order of the Court below ought to be reversed, and the Respondent ought to remain on the register for these shares, as well as for the other shares referred to in the order of Mr. Justice *Stirling*.

LINDLEY, L.J.:—

I am of the same opinion. There are two preliminary observations I should like to make before I go to the facts; one is in favour of this lady, and the other is against her. The observation in her favour is, that she is asking to have the register rectified before there is a winding-up of the company. That unquestion-

(1) Law Rep. 9 Ch. 392.

ably puts her in a more favourable position than she would be in if the winding-up of the company had already commenced. The other observation, which is against her, is this: that there never has been from the beginning to the end any mistake on her part about the facts. Such a mistake as there has been was a mistake by her, if any, as to the legal effect of what she has done. She has not taken these shares on the theory or supposition that they were in fact paid up to the full extent of £5. She knew all the time that they were not paid up, and were never intended to be paid up. No doubt she thought, not knowing the law, that she never would have to pay the balance.

Those observations having been made, just let us look now how the case stands. She applies to the company for 673 £5 shares, on which £4 10*s*. was to be credited as paid up, and she receives the allotment letter, and she is registered accordingly. Now stopping there for a moment, it is, I think, quite obvious that if she had found out what she says she has now found out, and had said, "This is not in compliance with the real understanding between us; I find these shares cannot be treated as paid up, and I never agreed to take any others," she would probably have been entitled to have the register rectified. If she had come a short time after, she need not have accepted what the company gave her; but if she does accept the shares the company gave her, it does not require a fresh bargain on her part to pay for them. That is the fallacy of the whole argument. If I ask for one thing, and have another thing sent me, and I keep it, I must pay for it—not because I make another bargain to pay for it when I say I will not, but because the law imposes on me an obligation to pay for it if I keep it. Now the moment she gets these shares and finds she is on the register, what does she do? Does she repudiate? Assume she might, but does she? Quite the reverse; being still in ignorance, as she says, of her rights—not in ignorance of any material fact, but being still in ignorance, or under an erroneous impression as to the legal effect of what she is about—she treats herself as a shareholder in respect of these shares. She sells some of them at an advantage. She exchanges the certificate which she had for the whole for the certificate of the residue which she continues to hold. Then she receives notices

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of meetings, she signs proxies, she writes letters opposing the increase of capital, and so forth; and, in short, knowing that she is a shareholder in respect of these shares, she accepts that position.

Well, then comes the question, does her liability depend upon whether she will or will not agree to pay for what she has bought? Certainly not. There she is met by the *Companies Act*, 1867, sect. 25, which says this: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined," and so on. That is her statutory obligation independent altogether of the question whether she agrees to pay for the shares or whether she does not. She has chosen to accept them with full knowledge of all the facts, and though the company is not being wound up it is far too late for her to repudiate them now.

As regards the cases, I do not think there are any which really assist us when they are looked at. Lord Justice *Cotton* has referred to one or two, and I will not allude to them any further. *Arnot's Case* (1), which at first seems to help her a little, went on this principle—that there was wanting what you have here, namely, an assent of the shareholder to keep the shares which were put in his name. Then there is *Carling's Case* (2). That was a directors' qualification case, in which the facts were totally different. The directors had got, and were registered in respect of paid-up shares which had been issued in pursuance of a duly registered contract. They got them by a gross breach of trust which was very much like a fraud, and the contention of the liquidator was that they were liable to be put on the list of contributories in respect of unpaid-up shares. The Court said, "No, they have got shares which are paid up and which cannot be treated as otherwise than paid up, and your remedy against them is for breach of trust, for which there is another and a distinct mode of relief." That has nothing to do with this case or any case similar to this. Mr. Justice *Stirling* did not give sufficient weight to the fact that the lady had become a member, nor to the 25th section of the *Companies Act*, 1867.

(1) 36 Ch. D. 702. (2) 1 Ch. D. 115.

BOWEN, L.J.:—

I am of the same opinion.

This case appears to me to be, in reality, an extremely simple one, and to turn upon the application of most ordinary principles of law.

The question is, whether the Respondent, whose name is upon the register, has agreed to become a member. The original contract under which she applied for shares was not one that, as long as it rested *in fieri*, could have been enforced. She applied for shares to be given to her coupled with a condition which the law would not recognise, and the company had no right, disregarding the condition, to force upon her something which she had not asked for.

If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the condition to them, which she made a portion of her offer, the company were not giving her what she asked for.

But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company, and to treat herself as a member of the company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is. I order goods of one description from a merchant; he cannot compel me to take goods of a different description, and he does not complete his contract by giving me goods of a different description; but if he sends me goods which are not according to the contract and which are not within the description of the contract, and I nevertheless elect to take them, my act with regard to them is evidence of a new contract, which the law will imply, to pay for that which I have kept. It is not that I promise in so many words to pay; it is that I do acts from which the law will imply in favour of the opposite party a promise. Here it is not that she kept all these new shares promising expressly to release the company from the original condition and to pay the entire sum, but she

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consented to allow her name to remain on the register and to keep the shares although they had not been allotted to her in conformity with the condition which she had imposed in her letter of application. From such assent to be on the register, and from such dealing with the shares which took place after she knew she was upon the register, there can be but one inference which the Court ought to draw, namely, that she agreed to be a member of this company; and her name being on the register, her liability to the company is complete.

This case is the converse of *Arnot's Case* (1). In *Arnot's Case* the original contract, just as here, could not have been enforced. The original contract, just as here, was not the one which the company had really carried out, because they had not given the applicant what he had asked for. In *Arnot's Case* the applicant never knew, and never assented to what the company had done in respect of the matter; he never knew and never assented to be upon the register or to be a member of the company after the time at which he knew he was placed on the register as a member of the company. Here the case is different. The evidence exists here which was wanting in *Arnot's Case.*

It appears to me that this case is quite clear, and that the decision of Mr. Justice *Stirling* ought to be reversed.

Solicitors: *Paine, Son & Pollock; James Neal.*

(1) 36 Ch. D. 702.

W. W. K.

In re WHITAKER (A PERSON OF UNSOUND MIND).

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April 8, 16.

Lunatic—Promissory Note, payable by Instalments, given while sane—Absence of Consideration—Moral Obligation—Payment out of Lunatic's Estate of Unpaid Instalments—Rights of Holder of Note—Form of Petition.

The payee of a promissory note given without consideration is not, even in the administration of a solvent estate, in the same position as the payee of a voluntary bond, so as to be entitled to claim against the estate after creditors for value.

A lunatic, while sane, had given a promissory note for £50,000, payable in instalments of £5000 each, in discharge of what he considered was a moral obligation, and had paid three of such instalments.

Upon a claim made against his estate, which was a very large one, after he had been found lunatic, by the holder of the note for the sum of £35,000, being the amount of the unpaid instalments thereon, to which claim the next of kin consented:—

Held, that although, as the gift was voluntary, the payee of the note was not entitled to claim as a creditor against the lunatic's estate, the Court in the exercise of its discretion would order the payment to be made thereout, by way of bounty and as in discharge of a debt of honour on the part of the lunatic, which, under the circumstances, it ought to recognise:

Held, also, that the application should have been made by the committee and that he must be joined as co-petitioner.

Dawson v. *Kearton* (1), *Lloyd* v. *Chune* (2), *Arthur* v. *Clarkson* (3), and *In re Richards* (4), criticised.

THIS was a petition presented by Mr. *Thomas Holden* in the matter of the above-mentioned lunatic, Mr. *T. S. Whitaker*, and asking for the payment, out of the fund in Court to the credit of the lunatic, of the sum of £35,000, the balance which the Petitioner claimed to be due to him upon a promissory note for £50,000 given to him by Mr. *T. S. Whitaker*, before he was found to be of unsound mind. The circumstances under which the claim was made were as follows:—Mr. *Whitaker* was a gentleman of considerable wealth, living near *Brough* in the East Riding of *Yorkshire*. He had a first cousin once removed, Mr. *William Liddell* by name, who was a barrister, though not in practice, and a very wealthy man, having large and valuable building estates at *Hull*, where he also carried on the business of

(1) 3 Sm. & Giff. 186.
(2) 2 Giff. 441.
(3) 35 Beav. 458.
(4) 36 Ch. D. 541.

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a shipowner in offices belonging to Mr. *Whitaker*, and where one Mr. *Fillingham* was his agent. Mr. *Liddell* was a bachelor, and his only relatives besides Mr. *Whitaker* were the children of a deceased brother, with whom all intimacy had for some time ceased, and certain other first cousins once removed, with whom he was not on friendly terms. Mr. *Holden* was a solicitor practising at *Hull*, who had been an old friend of Mr. *Liddell* and his family for more than forty years.

On the 23rd day of February, 1878, Mr. *Liddell* made his will, and thereby, after giving a legacy of £5000 to Mr. *Fillingham*, he gave and devised all his real and personal estate, which was nearly £400,000 in value, to Mr. *Whitaker* absolutely, and appointed him and *Fillingham* his executors. Shortly after making this will, Mr. *Liddell* gave it to *Fillingham* for safe custody in his office at *Hull*, where it remained until August 1885, when Mr. *Liddell* took it away, saying that he proposed altering it.

On the 10th of October, 1885, Mr. *Liddell* was seized at *Dover*, where he was residing, with an attack of *angina pectoris;* and he died on the morning of the 11th of October.

Fillingham arrived at *Dover* on the 12th of October, and took possession of the will and papers of the deceased. With the will was found a second will, entirely in the handwriting of Mr. *Liddell*, but unexecuted, and without any date except "1885," whereby, he had purported to give the whole of his real and personal estates (subject to a legacy of £5000 to *Fillingham*), to the petitioner Mr. *Holden*, and to appoint him and *Fillingham* his executors.

It appeared on the morning of his seizure, and after he had rallied slightly, Mr. *Liddell* had told his medical attendant, Dr. *Parsons*, that he had a little business which he should like to transact; but, having regard to his condition, the doctor advised him to wait till the morning, and, in the result, the business never was transacted. It was believed that the business which the testator desired to transact was the execution of the unsigned will.

Mr. *Whitaker* after the death of Mr. *Liddell* went to *Hull*, and saw the Petitioner twice, viz., on the 15th and 16th of October. On the first occasion, the Petitioner told him of the existence of

the unexecuted will, and on both occasions Mr. *Whitaker* stated to the Petitioner that he intended to give effect to what he believed had been the intentions of the testator, and substantially to benefit the Petitioner. On the first occasion this was said by *Whitaker* in the presence of his own solicitor, Mr. *Henry Wilson.*

On the 28th of November, 1885, the Petitioner received from Mr. *T. S. Whitaker* a promissory note in his own handwriting, dated the 17th of November, 1885, and in the following terms:—"On demand I promise to pay to Mr. *Thomas Holden*, or order, Fifty thousand pounds, value received.—*T. Stephen Whitaker.*"

This promissory note was inclosed in a letter to the following effect:—"Inclosed you will find a promissory note for £50,000, that being the amount which, after due consideration, I wish you to consider as a legacy to you under the will of my cousin the late Mr. *William Liddell.* It will not be convenient for me to pay the amount down, but I will do so by instalments, for which you will be kind enough to send me receipts, at the same time indorsing each payment on account on the back of the note. You will perhaps also send me the informal document in the late Mr. *William Liddell's* handwriting."

The Petitioner sent the unexecuted document to Mr. *Whitaker*, and he subsequently received from Mr. *Whitaker*, through Mr. *Henry Wilson*, three instalments of £5000 each on account of the promissory note. These instalments were respectively paid on the 2nd of March, the 27th of July, and the 9th of November, 1886, and on each of such occasions the Petitioner signed a separate receipt on account, and an indorsement of the payment on account upon the promissory note.

In the month of December, 1886, Mr. *Whitaker* was taken seriously ill, his mind became affected, and before any further payment had been made on account of the promissory note he was found of unsound mind upon an inquisition of lunacy held in February, 1888.

A committee of his estate was appointed in July, 1888, and there were now funds in Court, part of his property, standing to the credit of the lunatic to the amount of upwards of £177,000.

The lunatic was married but never had any children. So long as he was of sound mind he recognised the Petitioner's claim;

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and his wife, who was his sole next of kin, consented to this application. The petition was presented in pursuance of liberty given by the Court of Appeal on the 26th of February, 1889.

From the evidence in support of the petition it appeared that although the lunatic was not capable of managing his affairs because of delusions with regard to his bodily state, and the hold which those delusions had upon him, he was capable of a clear understanding of all matters of business, and of expressing an intelligent wish concerning them; and that he had been told of Mr. *Holden's* claim, and had said in writing, "I consider *Holden's* claim for the balance of the note for £50,000 to be a just one."

Romer, Q.C., and *Macnaghten*, in support of the petition:—

First, the Court will discharge out of a lunatic's estate a moral obligation incurred and partly discharged by the lunatic himself before he became of unsound mind: *In re Hewson* (1). And this principle is illustrated in numerous cases arising out of gifts to charities.

Although the sum asked for appears large, the great wealth of the lunatic must be taken into consideration, and there is also the circumstance that he is intelligent on matters of business, and himself desires that the moral obligation he has incurred should be discharged.

Secondly, the lunatic, while sane, gave to Mr. *Holden* a document which on the face of it conferred a legal right; and equity will give effect to a voluntary instrument creating a valid legal obligation, although it effects no transfer of property: *Ellison* v. *Ellison* (2). *Primâ facie* a promissory note imports valid consideration, so that the onus is not on a person who sues on a promissory note in the first instance to prove consideration; it lies on the defendants to plead and to prove want of consideration. In administering the estate of a testator the Courts will regard a promissory note, although given without consideration, as giving a claim in the nature of a debt, which is payable out of the estate of the deceased in priority to legatees though not to the prejudice of creditors: *Dawson* v. *Kearton* (3). In that case the Vice-Chancellor says (4):

(1) 21 L. J. (Ch.) 825.
(2) 1 W. & T. 6th Ed. p. 333.
(3) 3 Sm. & Giff. 186.
(4) Ibid. 191.

"If a voluntary obligation, in the nature of a debt, is treated as payable in preference to legatees, who are also mere volunteers without anything of the nature of an obligation or debt binding the testator himself, the principle would seem to apply as much to a promissory note by which the testator voluntarily bound himself, as to the voluntary obligation by bond."

[COTTON, L.J.:—A bond could be sued upon at law, a promissory note could not. Equity would cut down what a man could get at law. But I do not see how on that reasoning it would give a claim to a holder of a voluntary promissory note, which could not be sued upon at law. It was a merciful judgment in favour of the supposed legatee.]

Other cases to the same effect are *Arthur* v. *Clarkson* (1), *Lloyd* v. *Chune* (2), and *In re Richards* (3).

Perhaps the expression "debt" is not a correct one; but there is no real distinction in equity in this respect between a voluntary promissory note and a voluntary bond; the same principles are applicable to both, and as to voluntary bonds have been recognised since the days of Lord *Hardwicke*: *Ramsden* v. *Jackson* (4).

Tweedy, for the committee, submitted to the judgment of the Court.

1889. April 16. COTTON, L.J.:—

This is an application made by Mr. *Holden* for the payment to him of a sum of £35,000 as the balance of a promissory note given to him by Mr. *Whitaker* before he became of unsound mind. The petition was framed on the footing that Mr. *Holden* claimed payment as a debt, and in my opinion that view was wrong. This promissory note was entirely without any consideration; it was simply a bounty by Mr. *Whitaker* in consequence of the circumstances to which I have adverted; and in my opinion it can in no way be considered as putting Mr. *Holden* in the position of a creditor of the estate of the lunatic. It was indeed contended that there were several cases which would support the view that

(1) 35 Beav. 458.
(2) 2 Giff. 441.
(3) 36 Ch. D. 541.
(4) 1 Atk. 292, 294.

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in administering the estate of a testator the Courts would regard a promissory note without consideration as giving a claim in the nature of a debt; and in support of those cases, to which I will very shortly refer, Mr. *Romer* called attention to the fact that a voluntary bond is treated as constituting a debt, but to be paid after all the debts for valuable consideration. That did not increase the rights of the holder of a voluntary bond from what they were at law, but diminished them, inasmuch as he would have been able to sue at law as the holder of a voluntary bond, and there would have been nothing at law to postpone his claim to other debts. But at law there cannot possibly be any claim by way of action on a promissory note by the original person to whom the promissory note was given if he never gave any consideration for it. Neither in law nor in equity can the payee under a promissory note, which appears on the facts before the Court to be voluntary, have any claim as a creditor.

Several cases were referred to, but one has not really to consider any case like this. I will not go through them very carefully, but it will be right to refer to them shortly, for the purpose of examining whether they do lay down the proposition that the holder of a promissory note without any consideration can be treated in equity as having a claim by way of debt; and of saying that if they do, then I dissent from that proposition, and that in my opinion those cases, if they turned upon that proposition and so decided it, are not to be considered as laying down the law as it exists. Two of the cases were before Vice-Chancellor *Stuart*. *Dawson* v. *Kearton* (1), was one; and there, without saying whether the Vice-Chancellor was justified in doing what he did, it appears to me that he based his judgment to a great extent upon this, that there was a compromise, there having been a previous promissory note which was itself voluntary, but on which some question had been raised by the holder of the promissory note, and the maker of it had given a new note in exchange for the original note. That he referred to in his judgment and in the argument as one of the grounds of his decision. I do not say that I should agree with that, but still that may have been the ground of decision in that case, and it is

(1) 3 Sm. & Giff. 186.

possible that the Vice-Chancellor did not mean to lay down any such proposition as was relied upon by Mr. *Romer*.

The other case was *Lloyd* v. *Chune* (1), and there it is very doubtful to my mind—for there is not a judgment at any length upon it—whether the Vice-Chancellor did not rely upon this, that the defendant who was an executor, and who held a promissory note for the benefit of the plaintiff, Miss *Lloyd*, had during the lifetime of the testator, so acted in respect of the promissory note, by payment of interest on the amount, as to prevent the testator making any provision by way of legacy for this lady, and had thus by his conduct admitted himself to be indebted to her as executor in respect of the testator's estate. But I refer to that for the purpose of shewing that there may have been other circumstances in the case. So again in the case referred to of *Arthur* v. *Clarkson* (2), there was a trust declared of real estate as well as a voluntary promissory note, and the deeds relating to the real estate were deposited to secure the promissory note. Now, if the Judge relied on that I think that it was a questionable decision. But if he decided that the plaintiff could have a good claim as a creditor in respect of a voluntary promissory note, I think it right that I should express my dissent from the authority of such a case. Then there was a case of *In re Richards* (3). I do not think that Mr. Justice *North* there intended to lay down any such doctrine, but it is in my judgment unnecessary carefully to consider the case, because if he did lay down any such doctrine I must express my dissent from the view of the Judge on that question.

Then we come to this. This was, in my opinion, a mere voluntary gift on the part of Mr. *Whitaker*, and the question is what ought to be done now that he has been found of unsound mind.

We have full evidence of the circumstances under which he gave this promissory note; and the only thing that struck me was that there was no explanation by his solicitor as to what took place between himself and Mr. *Whitaker* as to his reason for giving the note. But I think, on the whole, looking to the fact

(1) 2 Giff. 441. (2) 35 Beav. 458.
(3) 36 Ch. D. 541.

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that at that time there was no suggestion that the lunacy had commenced, and that Mr. *Whitaker* did subsequently recognise this as a thing he wished to have done, that we ought to consider that this was his voluntary and free act. There can be no question that his real intention was to make a voluntary gift to Mr. *Holden*, not in any way as performing any obligation by way of debt or claim against the giver, but simply as a matter of bounty which he felt it right to shew towards Mr. *Holden* in consequence of the circumstances connected with his becoming residuary legatee instead of Mr. *Holden*. Therefore, although at one time I thought it might be right to have some further affidavit by the solicitor of Mr. *Whitaker*, I do not think we ought to require that.

Then ought the Court to perform this intended bounty, or to enable the estate of the lunatic to perform what he intended to do for Mr. *Holden?* Undoubtedly the Court has jurisdiction to do that, because we often (although not to so large an amount as this) give, out of the personal estate of a lunatic that which is mere bounty on his part when we see that it is in accordance with his views and his declarations before he became lunatic. That generally occurs in the case of charities where the lunatic has himself, while he was of sound mind, supported institutions of a charitable nature, and we continue that support, and perform for him when he becomes a lunatic that which we can see was his own intention while of sound mind. Here the amount which is asked for is very large, and at first sight looks somewhat startling; but then we must recollect that the lunatic, who was already a rich man, had, in consequence of the accident which had occurred, got a very large personal property, stated to be something like £400,000. In my opinion we should be perfectly justified in simply performing, or enabling the committee of the lunatic to perform, for the lunatic that which, when he was of sound mind, he intended to do.

Then there comes a question as to the form of this petition. I understand that the wife of the lunatic is the only person who represents the next of kin, and that she consents to this application. The committee of the estate also appears and consents; but the wife has not been served with the petition, and does not

appear at present; and, in my opinion, the form of the petition is one which ought to be corrected. Because it ought to be the petition of the committee asking the Court to authorize him to make this payment on behalf of the lunatic, that is to say, out of the lunatic's estate. As I said, the petition was framed on the footing of Mr. *Holden* being a creditor; that I think was wrong. Even if he were a creditor, we always object to creditors, or others than the next of kin, or those who are entitled to represent the next of kin, appearing before the Master in Lunacy. What I think ought to be done in order to shew that we do not recognise this as any claim by way of debt, is that the committee of the estate ought to be joined as co-Petitioner; and then that a consent brief ought to be delivered on behalf of the wife, and shewn to the Registrar before the order is drawn up. Subject to that we will make the order that the £35,000 be raised and paid by the committee to Mr. *Holden*.

LINDLEY, L.J.:—

In my opinion that order is right.

By an accident, and a mere accident, Mr. *Liddell* died under such circumstances that a very large fortune came to Mr. *Whitaker*, which apparently was intended to go to Mr. *Holden*. Mr. *Whitaker* was then of sound mind, and he had the feelings of a gentleman. He said to Mr. *Holden*, "I won't benefit by this accident to the full extent. I cannot afford not to benefit by it at all, but I will make you a present of £50,000;" and Mr. *Whitaker* gave him a promissory note for that amount, and afterwards paid three instalments of £5000 each as they became due. Mr. *Holden* now asks for the balance.

Now I take it to be quite plain in point of law that the payee of a promissory note for which there was no consideration is not in the same position as the payee of a voluntary bond, even in the administration of a solvent estate. The payee of a voluntary bond can bring an action on the bond at law; the payee of a promissory note for which there is no consideration cannot maintain an action at all. When Mr. *Holden* puts this claim forward as the claim of a creditor he makes a mistake; he is not a creditor. But it does not follow because he is not a creditor that

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therefore he ought not to be paid; and in exercising the jurisdiction which the Court has over the property of the lunatic, the Court will see that the honour of the lunatic is upheld. Mr. *Whitaker*, a right-minded, liberal, honourable man, wished to present Mr. *Holden* with £50,000, and he gave him £15,000 on account. The unpaid balance is a debt of honour, not in the sense of a gambling debt, which I consider a debt of dishonour, but a debt of honour which this Court ought to recognise, if it can with justice do so. There is no conflict here between creditors—nothing of that kind. There is a very large fortune, and it appears to me right in the exercise of our discretion that we should order this sum of money to be paid.

Solicitors: *Hargrove & Co.; Maresco Pearce.*

W. W. K.

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[1888. T. 1429.]

Trade Name—Imitation—Defendant using his own Name—Costs—Higher Scale.

The Plaintiffs had for many years carried on the business of steel manufacturers under the name of *Thomas Turton & Sons.* The Defendant *John Turton* had for many years carried on a similar business in the same town, at first as *John Turton*, then as *John Turton & Co.* In 1888 he took his two sons into partnership and carried on the same business as *John Turton & Sons.* There was no evidence that the Defendants imitated the trade-marks or labels of the Plaintiffs or otherwise attempted to deceive the public:—

Held (reversing the decision of *North*, J.), that although there was a probability that the public would be occasionally misled by the similarity of the names the Plaintiffs were not entitled to an injunction restraining the Defendants from the use of the name *John Turton & Sons.*

The Plaintiffs were ordered to pay the costs of the action on the higher scale.

THE Plaintiffs, *Thomas Turton & Sons (Limited)*, were a limited company, and they carried on the trade of merchants and manufacturers of steel and of plates at the *Sheaf Works, Sheffield.* The business had been carried on by them and their predecessors in

Sheffield for a great many years. Originally there were two separate businesses carried on by two separate firms, *William Greaves & Co.* and *Thomas Turton & Sons*; but in 1849 the two firms were amalgamated and the united businesses were thenceforth carried on under the firm of *Thos. Turton & Sons* down to the year 1860, when the goodwill of the business and the trade-marks used in connection with it were purchased from the then partners by Sir *F. T. Mappin*, who thenceforth continued to carry it on under the firm of *Thos. Turton & Sons* down to the year 1886, when the business, goodwill, and trade-marks were transferred to the company, *Thos. Turton & Sons, Limited*, which was registered under the *Companies Acts*. The company consisted of only seven persons, Sir *F. T. Mappin*, his three sons, and three other persons. In 1884 Sir *F. T. Mappin* registered under the *Trade Marks Act*, 1883, in connection with the different classes of goods in which he dealt, four trade-marks, which had been in use by the firm for many years previously to the 13th of August, 1875, viz. (1) the device of a spur with the letters *T. T. S.*; (2) "*T. Turton*"; (3) "*T. Turton & Sons, Sheaf Works*"; (4) "*Thos. Turton & Sons.*" These marks were still used by the limited company. The business of the Plaintiffs had been for many years a very extensive and profitable one, and they had a large connection, not only in the *United Kingdom*, but also in the Colonies, in *Europe* generally, in *North* and *South America*, and in *India*.

The Defendants were *John Turton* and his two sons, who were carrying on in partnership, at the *Vulcan Works, Sheffield*, a business of a similar description to that of the Plaintiffs, under the style of *John Turton & Sons*. The Defendant *John Turton* commenced carrying on business at the *Vulcan Works* in the year 1869, and from that time down to 1872 he traded as *John Turton & Co.*, *Frederick Lawton* being a sleeping partner with him. From the beginning of 1872 down to the end of March, 1878, *Lawton* was an ostensible partner, and during that period the business was carried on under the firm of *Turton & Lawton*. In March, 1878, *Lawton* ceased to be a partner, and from that time down to the end of June, 1888, *John Turton* carried on the business alone under the firm of *John Turton & Co.* He then took his two sons

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(the other Defendants) into partnership with him, and the name of the firm was changed to *John Turton & Sons.*

By their writ in this action, which was commenced on the 11th of August, 1888, the Plaintiffs claimed an injunction to restrain the Defendants from carrying on the businesses of merchants and manufacturers of steel and of plates, or any of such businesses, under the firm or style of *John Turton & Son*, or any firm or style so closely resembling the Plaintiffs' name as to be calculated to deceive. The Plaintiffs moved for an interim injunction, and the motion was ordered to stand over to the trial of the action, the trial being advanced. The action now came on for trial upon affidavit evidence.

A number of affidavits were filed on behalf of the Plaintiffs, to the effect that, before the incorporation of the Plaintiff company, the name "*Turton & Sons*" was much more commonly used in relation to the business of the Plaintiffs' firm by customers and others than the full title of "*Thos. Turton & Sons,*" and that the name of "*T. Turton & Sons*" was also constantly used by customers and others; that the Plaintiff company was much more commonly called by customers and others "*Turton & Sons*" than "*Thos. Turton & Sons, Limited,*" and that letters intended for them were often addressed to them as "*Turton & Sons*" or "*Thos. Turton & Sons*" (without the word "Limited") and "*T. Turton & Sons,*" the word "*Sheffield*" only being in many cases added, without the name of the company's works, and that cheques intended for the Plaintiffs were frequently made payable to the above names. Many of these affidavits were made by the Plaintiffs' rivals in trade in *Sheffield.* The witnesses expressed their opinion that the firm name adopted by the Defendants would lead to confusion between their firm and the Plaintiffs', and that persons who intended to give orders to the Plaintiffs would be misled into sending their orders to the Defendants. There was evidence that since the Defendants had adopted the name of "*John Turton & Sons*" letters intended for the Plaintiffs had in several instances been delivered to the Defendants, who had sent them on to the Plaintiffs. There was also evidence that, when railway companies issued specifications of steel goods for which they invited tenders, they referred to the Plaintiff company as "*Turton & Sons.*" In

one of the instances given it was stipulated that "piston rods," for the supply of which tenders were invited by a railway company, were "to be of the best crucible steel (carefully annealed) by Messrs. *Vickers; Sons, & Co., Cammell & Co., Turton & Sons,* or other approved makers." By "*Turton & Sons*" in that specification the Plaintiff company was meant, by "Messrs. *Vickers, Sons, & Co.*" was meant "*Vickers, Sons, & Co.* (*Limited*)," and by "*Cammell & Co.*" was meant "*Charles Cammell & Co.* (*Limited*)." Other instances of the kind were given.

The Defendants, on the other hand, filed a large number of affidavits by persons engaged in the trade, to the effect that there was sufficient distinction between the name of the Plaintiff company and that of the Defendants' firm to prevent mistakes being made. The Defendant *John Turton* deposed that the name of his firm had been adopted merely for the purpose of making known the fact that his sons had become partners in the business, and that there was no intention of passing off the Defendants' goods as those of the Plaintiffs. There was no evidence, other than that derived from the use of the firm name, that the Defendants had done anything to pass off their goods as those of the Plaintiffs.

The works of the Plaintiffs and the Defendants were situate in different parts of *Sheffield,* being about a mile distant from each other.

It was held by Mr. Justice *North* that the defendants had adopted a descriptive name the use of which was proved to be calculated to deceive; and that the Plaintiffs were entitled to an injunction according to *Hendriks* v. *Montagu* (1).

W. L. C.

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From this judgment the Defendants appealed. The appeal came on to be heard on the 20th of May, 1889.

Rigby, Q.C., *Everitt,* Q.C., and *Chadwyck Healey,* for the Appellants:—

The Plaintiffs' complaint is of our use of the words "& Sons," and they say we ought to be restrained from such user. But we

(1) 17 Ch. D. 638.

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are honestly using our own names, and it is clear from the authorities that a trader is entitled to use his own name for the purposes of his business, provided he uses no fraud or artifice to attract to himself the business of a rival trader of the same name: *Fullwood* v. *Fullwood* (1); *Burgess* v. *Burgess* (2); *Croft* v. *Day* (3); *Massam* v. *Thorley's Cattle Food Company* (4); *Warner* v. *Warner* (5). The name under which we trade is a correct description of our firm; it is not a mere fancy name. A descriptive name is not a fancy name: *In re Van Duzer's Trade-mark* (6). If, then, it is not a fancy name *Hendriks* v. *Montagu* (7), upon which Mr. Justice *North* relied, is no authority in this case.

Cozens-Hardy, Q.C., *Moulton*, Q.C., and *J. Cutler*, for the Respondents:—

We admit that a man may use his own name, if there are no circumstances of fraud attending the user: but in doing so he must use some distinction to prevent the public being misled into thinking that his business is that of an old-established trader of the same name.

[LORD ESHER, M.R.:—A man is using his own name by a proper and natural description: has that ever been held to be a case in which the Court can interfere?]

Yes; that is *Hendriks* v. *Montagu*. The Defendants may, no doubt, use the name "*John Turton & Sons*" as their business name, but to prevent their firm from being taken as ours they should adopt some distinctive description, as by placing underneath the names of the partners. The fact that the name assumed by the Defendants for their business contains no misstatement, and that the Defendants assumed it without an intention to injure the Plaintiffs is immaterial. They know now that the effect of their taking the name is injurious to us, and it is inequitable for them to retain it. It is only necessary for us to prove—(1) That the Plaintiffs' trade name has acquired such an association with the goods made by the Plaintiffs as to lead

(1) 9 Ch. D. 176.
(2) 3 D. M. & G. 896.
(3) 7 Beav. 84.
(4) 14 Ch. D. 748.
(5) 5 Times L. R. 327, 359.
(6) 34 Ch. D. 623.
(7) 17 Ch. D. 638.

buyers to suppose they are made by them; (2) That the Defendants in taking the name have done something which will lead to the probable consequence that their goods will be taken to be goods made by the Plaintiffs. We say further that the motives and intentions of the Defendants in choosing such a trade name are important as being evidence that the name was calculated to mislead the public; otherwise they would not have taken it. In the present case our evidence sufficiently proves our proposition independently of any intention on the part of the Defendants to deceive the public. There may not be any case exactly like the present, but the principle on which we rely is fully borne out by the authorities: *Croft* v. *Day* (1); *Singer Machine Manufacturers* v. *Wilson* (2); *Singer Manufacturing Company* v. *Loog* (3); *Merchant Banking Company of London* v. *Merchants' Joint Stock Bank* (4); *Newman* v. *Newman* (5); *Massam* v. *Thorley's Cattle Food Company* (6); *Edelsten* v. *Edelsten* (7); *Burgess* v. *Burgess* (8).

LORD ESHER, M.R.:—

In this case an action was brought for an injunction against the Defendants, not for using any trade-mark of the Plaintiffs, but for carrying on business under the name in which they have carried on business, and in which they propose to carry on business, and to which they claim to have a right.

The Plaintiffs had carried on business under the firm name of *Thomas Turton & Sons*. That business had been carried on by the Plaintiffs and their predecessors for a long series of years at the same manufactory, and their business had been carried on in such an excellent manner that the name of *Thomas Turton & Sons* had become known in the steel or iron trade, and carried with it the prestige of the name as signifying that if steel was bought from them it would be of the excellent quality that had always been maintained by the manufactory. It was not only that they had used the name, but that the name had come to be a name which

(1) 7 Beav. 84.
(2) 3 App. Cas. 376.
(3) 8 App. Cas. 15.
(4) 9 Ch. D. 560.
(5) Cited 9 Ch. D. 564.
(6) 14 Ch. D. 748.
(7) 1 D. J. & S. 185.
(8) 3 D. M. & G. 896.

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would give a prestige to goods in the market. Under those circumstances it is alleged and proved against the Defendants that the father first of all set up a business in the same town, a considerable part of which was for the same kind of manufacture of steel as the Plaintiffs'. After a time he took into partnership his two sons. He had first of all carried on business in his own name, which was *John Turton*, and after a time he took as partners his two sons, who had been working in his manufactory. When he took his sons in as partners he took as his business description "*John Turton & Sons.*" Now it is not alleged—certainly it is not proved against him—that he did anything in the way of his trade which tended to give any other meaning to the name in which he carried on his business, or which could give any other meaning to it, than merely the fact that he did carry on business, and was in partnership with his sons. He had not done anything with the intent or for the purpose of making the use of his simple name look as if his name were the name of the Plaintiffs. In some cases, besides using the name, parties have, to use what I think is a happy phrase of my brother *Cotton's*, garnished that use—that is, they have done things besides using the name in order that the use of that name might look as if it were being used by the old firm. There is nothing of that kind here. The Defendants have carried on a business a great part of which is the same as the Plaintiffs, but they have carried it on in the name of *John Turton & Sons*, the name of the principal being *John Turton*, and it being true that he has taken his sons in as partners—he has done nothing but that. That is all he proposes to do, and, as has been pointed out by Mr. *Rigby*, although at one time there seems to have been an allegation that he was doing something more than that in order to make people believe that the manufactory was the manufactory of the Plaintiffs, that allegation is withdrawn, and therefore it is clear that there is no charge that he has done anything but simply used it as his business name, and simply carried on his business with a statement that he is carrying on his business himself as *John Turton* and with his sons as partners, which is the accurate and exact truth.

Therefore the first question of law in the case is this: Sup-

posing that, and that only, is done by the Defendants, but, nevertheless, some people, or, if you please, many people, in the market, do from time to time give orders intending them for the Plaintiffs' firm which on account of the similarity of name go to the Defendants' firm, are the Plaintiffs entitled to an injunction? If there had been anything more than the mere use of the name by the Defendants in the way I have stated, that there might have been a necessity for an injunction, I think, cannot be denied. Here are two firms, *Thomas Turton & Sons* and *John Turton & Sons*: well, careless people may not notice the difference of Christian name, and may look more to the words "*Turton & Sons*" which are the same in both. That might be so. Therefore, for this purpose I assume that the names are sufficiently alike to cause those blunders in trade; but they are blunders of the people who make the blunders. Has the Defendant done anything to so far cause those blunders even though he did not intend it, which entitles the Court to stop him from doing what he is doing? He is simply stating that he is carrying on business with his two sons as partners. I say that is the accurate and exact truth of what he is doing. I will assume for the moment that it is pointed out to him that, he doing that, blunders will occur in the business and that the results which are complained of will happen. Is there anything dishonest—is there anything wrong morally, in any, even in the strictest sense, in a man using his own name, or stating that he is carrying on business exactly as he is carrying it on? Is there anything wrong in his continuing to do so, because people make blunders, and even, if you please, because they make probable blunders? What is there wrong in what he is doing?

Now it is said that the Plaintiffs have a trade name and a property in their name. I doubt about property, though they have this right: That no man shall wrongfully interfere with their name. But they have no right to say that a man may not rightly use his own name. I cannot conceive that the law is such. If the law were such, the law would be most extraordinary and, to my mind, most unjust—to prevent a man's using his own name. And I must say this, that all the arguments which have been used in this case would have been equally

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applicable if there had been nothing about sons, and if one man were carrying on business as *Thomas Turton* under the circumstances in which *Thomas Turton & Sons* were carrying on their business, and another man named *John Turton* were to come and carry on his business simply in his own name. Therefore the proposition goes to this length; that if one man is in business and has so carried on his business that his name has become a value in the market, another man must not use his own name. If that other man comes and carries on business he must discard his own name and take a false name. The proposition seems to me so monstrous, that the statement of it carries its own refutation. Therefore upon principle, I should say it is perfectly clear that if all that a man does is to carry on the same business, and to state how he is carrying it on—that statement being the simple truth—and he does nothing more with regard to the respective names, he is doing no wrong. He is doing what he has an absolute right by the law of *England* to do, and you cannot restrain a man from doing that which he has an absolute right by the law of *England* to do.

Now let me see if there is authority for what I am saying. I am not going to read what is called the epigrammatic judgment of Lord Justice *Knight Bruce*. I do not think that a truthful proposition is a bit worse because it is put in an epigrammatic form. It fixes the proposition on one's memory; and when I look at the judgment of Lord Justice *Knight Bruce* I can see no difference in the smallest respect between that judgment and the judgment of Lord Justice *Turner* which immediately follows it, except in the form of expression. But as something which will not give rise to cavil I will take the judgment of Lord Justice *Turner* in *Burgess* v. *Burgess* (1): "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." That he says is the fundamental proposition "Where a person is selling goods under a particular name, and another person, not having that name"—that is where it is not his real name—"is using it, it may be presumed that he so uses it to represent the goods sold by himself as the

(1) 3 D. M. & G. 904.

goods of the person whose name he uses." It looks to me rather as if that would be a *primâ facie* case. One name is stamped with peculiar value which is given to it; another man who has not that name comes and takes that name. I think *primâ facie* that would look as if he were doing it for the purpose of interfering, and for the purpose of representing his goods to be the goods of the other. "But where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff." That is to say, if only those two facts are established, that does not make a *primâ facie* case. The first does make a *primâ facie* case, but the second does not. Then Lord Justice *Turner* goes into the second case. He does not say so, but the next sentence is: "It is a question of evidence in each case." The first is a *primâ facie* case, but it may be answered by evidence. In the second case, although that is not a *primâ facie* case there may be other circumstances. "It is a question of evidence in each case whether there is false representation or not." He does not say whether there is "representation" or not, but "false representation." That is he goes back to his fundamental proposition: No man can have the right to represent his goods as the goods of another person. Therefore if a man uses his own name, that is no *primâ facie* case, but if besides using his own name he does other things which shew that he is intending to represent, and is in point of fact making his goods represent, the goods of another person, then he is to be prohibited, but not otherwise.

I take that to be a perfectly correct representation of what I think the law is, and I think that when you look at the judgment of Lord *Blackburn* in the case of *Singer Machine Manufacturers* v. *Wilson* (1), you will see that he really comes to the same conclusion. At page 400 Lord *Blackburn* says, "This is not an action to recover damages for a wrong already committed, but an application for an injunction to prevent the continuance of a wrong which has been committed, and is threatened to be repeated; and I think that if it were proved that the course pursued would really produce the effect of passing off the

(1) 3 App. Cas. 376.

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defendant's goods as and for the plaintiff's" he is speaking of the particular case in which a man had taken a name not his own—"the injunction should be granted (whatever might be the case as to the account) whether the defendant heretofore meant it to produce that effect or not." There he had the case of a business carried on in such a way that the name had become valuable and there was another man not using his own name, but taking a name which was not his, but closely resembling the plaintiff's name. That is the first case mentioned by Lord Justice *Turner*. Lord *Blackburn* seems to me by what I am next going to read to say that might be innocent up to that time because he might not know and might not intend any interference. If you were asking for damages for what was past you would have to prove more than the fact that he had taken the name and that he had injured you—you would have to prove that he intended it. You would have to prove that what he was doing was fraudulent. That is clear. But he says if he had not that intent, what he had done, although injurious to the plaintiff up to that time, might be innocent, and if it were innocent the law cannot interfere. But he goes on and says that under those circumstances the plaintiff having shewn the facts and what was done before would not be called upon to prove the fraud in order to get an injunction. Why? Because he says after the matter had been made clear to the defendant and the injury he had been doing, not by taking his own name but by taking another name, had been pointed out, then if he had persevered as he threatened to do after learning that what he was doing produced these effects, he would, unless in very exceptional cases, do a wrong. That seems to me to adopt the principle which Lord Justice *Turner* laid down. It comes to this, that you cannot recover damages against a man if he has only done that which he has a perfect right to do; you cannot recover damages against a man unless he has done something which is a wrong against the plaintiff. But you can grant an injunction against a man if he is proposing to do, and insisting that he has a right to do, that which if he does it in the future will be a wrong act against the plaintiff. Therefore, it is not necessary to shew a past wrong. It is sufficient in order to support a claim for an injunction that

a man is proposing to do that which will be wrong in the future. But if all that you are proposing to do in the future is simply that which by the law of this country you have a right to do, no injunction can go.

Therefore, if you take the case before us and try it by those principles, the Defendants have done no wrong in the past, and, even though that which is alleged to be the result, and which for this purpose I will assume to be the result, follows, and although the result to the trade of the Plaintiffs which they allege will take place in the future may follow, nevertheless, that result is not the result of any act of the Defendants which can be said to be a wrong act even against the Plaintiffs. The Defendants have done nothing but carry on business and state to the world that they carry on that business in the exact way in which they carry it on. *John Turton* has done nothing more than that he has carried on business under this statement, "I carry on my business as the father, *John Turton*, with my two sons as partners." That is strictly accurate, and he has done nothing more. And I desire to say, that if the name of the Plaintiffs' business which they had carried on had been *Thomas Turton & Co.*, and that name had become valuable, and if the Defendants had *bonâ fide* and honestly formed a company himself and had carried on business merely stating that his business was carried on by *John Turton & Co.*, if that were an accurate description of a *bonâ fide* company constituted by himself, the same result would have followed if he had done nothing more than that because that statement also would be only simply and perfectly accurate.

Therefore, on these grounds, I think that even though the Defendants had done damage to the Plaintiffs, there would have been no ground for an injunction against the Defendants.

I therefore think it unnecessary to determine—although I do not mean to determine it the other way—what the exact result of the evidence is with regard to the business of the Plaintiffs.

I am of opinion in this case, both on principle and authority, that the appeal must succeed.

As to *Hendriks* v. *Montagu* (1), which has been cited as against myself and my brother *Cotton*, in order to frighten us by some-

(1) 17 Ch. D. 638.

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thing which we had said in a former case; if I have said something in that case not necessary to the decision of the case, and I have found now that what I then said was wrong, I should nevertheless go home with a quiet mind, believing that when the point came to be material I decided it rightly, although when it was immaterial I had said something wrong about it.

COTTON, L.J.:—

This case is one of considerable importance, and I think the judgment that has been given by the Master of the Rolls is the right one. It would lead to most serious consequences if people having acquired a business reputation with a name could prevent any man of the same name from carrying on the same business. That is clear and simple.

As to the facts, I agree with what was stated by the Master of the Rolls, but I think it right to state them again shortly. The Defendant, *John Turton* the father, had carried on business as steel roller only originally, but afterwards, and before he formed the present partnership, he carried on that business and added to it the business of steel manufacturer, and a year ago he took two sons, who had been brought up in the business, into partnership. Now it is not for one moment suggested that those sons had not a substantial interest in that partnership; it is not suggested that they were brought in simply for the purpose of adding their names to the firm name under which the father carried on business, but it was assumed that they were fairly and honestly partners in the business. Then the father having taken his two sons in and made them partners takes the name of *John Turton & Sons.* In my opinion he does that in the ordinary way of expressing to the mercantile world the fact that his two sons were taken into the business with him in order to introduce them and to put them before the world as persons who were interested as partners in this business. He sends round a circular to all his customers including the present Plaintiffs announcing that fact in terms to which no objection is made except as applies to the use of the name *John Turton & Sons.*

The Plaintiffs were a company who had been carrying on a business which in many respects is similar to the business carried

on by the Defendants under the name of *Thomas Turton & Sons*, to which they add the word "Limited" wherever they express their name in various documents—invoices, &c. That is their name. No bills or billheads have been produced by the Plaintiffs. I assume—because the Plaintiffs have not shewn anything to the contrary, and it would have been an important thing—that there is nothing in the Plaintiffs' billheads which it can be said the Defendants are imitating so as to make any false representation as to the name of the firm which they are carrying on. There is no trade-mark—no goods of the Plaintiffs have been produced with any marks upon them which it is said the Defendants are imitating or have upon their goods.

Therefore it simply comes to this, that there is the name of the Defendants taken under the circumstances which I have mentioned, *John Turton & Sons*. Mr. Justice *North* has restrained them from using that name in the business which they carry on, though there is nothing at all to represent in any way that the business which they are carrying on as *John Turton & Sons* is in any way connected with or is the same business as that carried on by the limited company, *Thomas Turton & Sons*.

We had laid down to us various ingenious propositions by Mr. *Moulton* which I will not discuss *seriatim*. What is the principle of these things? It is expressed in what was said by Lord Justice *Turner* in *Burgess* v. *Burgess* (1). That has been read by the Master of the Rolls, and I will not read it again. But the principle is this—No man must pass off his goods as the goods of another. That is the principle upon which it goes. Of course that may be done unintentionally, but where there is a manifest and natural meaning in the words used that the goods are the goods of somebody else, and the man who uses those terms uses not his name only, but somebody else's, he would be stopped from doing so as soon as he is aware of the facts which make the *primâ facie* intention and result of what he is doing, passing off his goods as the goods of somebody else. It was formerly said that no action could be maintained unless a man had done so fraudulently and intentionally, but when he finds out that the natural construction of what he is doing, when the facts are

(1) 3 D. M. & G. 896.

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known, is to represent his goods to be somebody else's, then he would be stopped, even though he had originally done that unintentionally, and innocently.

I may say here that the cases as to the trade-marks which were a great deal relied upon by Mr. *Moulton* are very different from the case of a name, because a trade-mark is a thing which is assumed and invented by a man for the purpose of his goods, and there is no necessity for anybody else putting that mark upon the goods unless the mark is meant to identify them in such a way as to represent that they are the goods of somebody else whose goods are identified in the same way. Of course if a man takes a mark for his goods the same as that of another man, although he has not done it intentionally, it is wrong to go on with that representation on his goods when *primâ facie* it would be taken to mean, not that they are his, but those of some other well-known manufacturer. But here there is no question of trade-mark. As I said before, it is simply a question of name. Here in my opinion, what has been done by the Defendants is simply in the ordinary mercantile way to indicate to the world and to the customers of the firm that the sons have been taken into the business and are carrying on the business with their father. Mr. Justice *North* said—and I think it was one of the foundations of his judgment—that this was a firm name, or a fancy name, and that was argued by Mr. *Moulton*. But what does this argument come to? I will put it in a syllogistic form. He says, some firm names are fancy names, therefore all may be so, therefore all are. It comes to this; that all are fancy names because some are and all may be. That is entirely wrong. It is very true that a firm name may be a mere fancy name not indicating any members of the firm, but only indicating that the firm continued to carry on the business, where originally the firm name was a mere short description of those partners who carried on the firm. Further, it may not be even any description at all of the partners who carry on the business, but some name which has been adopted for some reason or other, then it can perhaps be called a fancy name. Here if I am right in the conclusion at which I have arrived as to matters of fact, that without any fraudulent intention, and merely in the ordinary mercantile way

of indicating the fact that the sons are partners, the Defendants have taken the name, it would be wrong to hold that this was a fancy name, or anything but a short convenient way of indicating that the sons are in the business, and have been taken in as partners. That once established, we ought not to deal with it on the footing upon which Mr. Justice *North* dealt with it—that it was a fancy name assumed by the Defendants, but it is a mere statement in ordinary language—an honest statement of the persons who carry on the business, and it must be dealt with in the same way, as if it was not the name of the firm describing those members who make up the firm, but the name of an individual carrying on business in his own name. In my opinion the Court cannot stop a man from carrying on his business in his own name, although it may be the name of a better known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacturer. If that were to be so there would be at once a monopoly obtained in the use of names by any persons, who by carrying on business in one name got a reputation; and it would be a very convenient way of enabling traders to prevent any competition with them by any persons who had the same name in the same trade. Of course there must be some confusion when a person who has the same name as another carries on the same business in the same town or place, because unless people are careful to see that it is *Thomas* or *John* they may easily go to one when probably they intend to go to the other, and the post-office may very frequently make mistakes, even although one has been established for a long time, if both carry on business together. If one man has been established for a year only, could the Court properly be asked to prevent another man of the same name from coming into the town and carrying on the same business in the same goods simply because the post-office would be likely to make mistakes and deliver letters to the wrong person? Of course if anything were done by the second man to hold out or represent that his shop was the shop of the other, or that he was connected with the other when he was not, if there were something added to the name which would enable the Court to interfere on the ground that he

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was trying to represent his business to be the business of the other man, then the Court would interfere.

Then it was said that the authorities are in favour of the Plaintiffs in this case, and various cases were referred to. They are well-known cases. One case that was mentioned was the case of *Croft* v. *Day* (1). There *Croft* was the executor of *Day* who had owned the business of *Day & Martin*. The defendant was a man of the name of *Day*, I think a relation of the last *Day*. He was restrained not from carrying on business in the name of *Day & Martin*, but from representing that his goods were goods manufactured by the old firm of *Day & Martin*. What had he done? He had got somebody of the name of *Martin* who was no connection in business with him to agree to come in and be his partner so as to get the benefit of the name of *Day & Martin*. Getting a man who is not interested in the business to come in and join him for the purpose of saying he has the name of *Day & Martin* would be very strong evidence indeed to shew that he was trying to represent his goods as those of the old firm of *Day & Martin*, to which the executors had a right. When we come to the judgment of Lord *Langdale* he goes through the instances that were given for the purpose of shewing that the defendant had made those representations. There was such a similarity in the advertisements of the defendant as to shew an intention on his part to pass off his goods as the goods of another. I do not in any way say that fraud is necessary to induce the Court to interfere except this, as I said before. When a man knows that the natural consequence of what he is doing is to represent his goods as the goods of somebody else, then it is wrong on his part to continue that act. Mr. *Moulton* pressed in argument this: that the Court ought to interfere and stop anything which may be injurious to another person; yes, if the act done is a wrong one; but whenever a man sets up business in a town, although it would be interfering with, and to a certain extent injuring those who were carrying on business before under the same name, in my opinion it would be a wrongful act on the part of the Court on those grounds to stop that man from carrying on his business.

(1) 7 Beav. 84.

Then there was a case quoted which I was rather surprised to hear cited; that was the case of *Merchant Banking Company of London* v. *Merchants' Joint Stock Bank* (1). In that case the late Master of the Rolls said (2): "As the law originally stood I think that any person might use his own name for the purpose of trade, and might use any fancy name for the purpose of trade. If a man's name was *Brown* or *Jones*, he was not compelled, according to the common law, to carry on trade under the name of *Brown* or *Jones*, but might carry on trade under any fancy name he chose, and the mere fact of somebody else having the same name and carrying on trade under that name does not prevent another person from doing the same. If *John Brown* sells coals, another *John Brown* may sell potatoes," and I should add he may also sell coals. "There is no law that I know of to prevent him from selling his potatoes under the name of *John Brown*; the first *John Brown* could not in such a case restrain the second *John Brown* from carrying on trade under his own name." Then he goes on in a similar way to shew that where there is the mere fact that one man of a particular name carries on a particular business the Court will not interfere to prevent a man who honestly does it, from carrying on under the same name a similar trade or the same trade.

Now I come to another case which was referred to both by Mr. *Cozens-Hardy* and Mr. *Moulton*, *Hendriks* v. *Montagu* (3), on which Mr. Justice *North* founds his judgment, and founds it I think without considering what was the subject the learned judges were dealing with in their judgment when they used the expressions on which he relies. That I say has always to be considered, because Judges do not always guard themselves carefully when they are addressing people whom they suppose to have a knowledge of the law so as to prevent their judgments being applied to all the possible cases which might arise under entirely dissimilar circumstances. In *Hendriks* v. *Montagu* there was a question between two companies. One was called the *Universal Life Assurance Society*—that was the plaintiff company—and the defendants chose to call themselves the *Universal Life Assurance Association*. That name of the defendants was in no way a statement of facts, or of the persons who were going to carry on

(1) 9 Ch. D. 560. (2) 9 Ch. D. 563.
(3) 17 Ch. D. 638.

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the business. It was there really a fancy name which they adopted—a name which they had manufactured themselves—and the Court thought they ought not to be allowed to do that, having regard to the fact that there was a then existing company carrying on the business which the defendants proposed to carry on under that name—the *Universal Life Assurance Society*. It could not but be according to the ordinary course in the understanding of the people who had to deal with them, a representation that the business carried on by the defendants was the business in fact carried on by the plaintiffs. Therefore the Court stopped that and prevented it from being done. In that case also this fact was not immaterial, that although it was not a case under the *Companies Act*, they were governed by the provision there that no name should be registered like a name already registered. In my opinion that case cannot be in any way relied upon in the present case.

A man takes a fancy name not to express real facts, but he takes a name which for some reason or other he chooses. If that had been the case here, it would have been a different thing. In my opinion it would be wrong to come to the conclusion here that there was any passing off of the goods of the Defendants as the goods of the Plaintiffs. It must be a question of fact, as indicated by Lord Justice *Turner* in the case of *Burgess* v. *Burgess* (1). The mere fact that the name used by the Defendants is the same as that of another person, in my opinion will not justify the Court in assuming that the Defendants are passing off their goods as the goods of that other person. It may lead to the conclusion that there will be some difficulty occasioned by the fact, as undoubtedly there will be, but in my opinion when a man fairly states the business which is carried on in his own name or in the names of his partners it is not that his goods may be passed off as the goods of some other person: it is only a representation that they are made by himself. In my opinion, therefore, this judgment is wrong, and the appeal succeeds.

FRY, L.J.:—

I also find myself unable to agree with the decision of the learned Judge who first tried this case. The facts of the case

(1) 3 D. M. & G. 896.

seem to me shortly to amount to this, that the Defendants have made a statement of a fact, namely that *John Turton* and his sons are partners. They made that statement simply and without any varnish or colour. They made it truly, honestly, and in the usual manner in which such statements are made in the course of business. Furthermore, they made it without any misrepresentation, either fraudulent or innocent; and they made it equally without any design or intention to injure the Plaintiffs. The statement which they thus made was one which they had a *primâ facie* right to make, and it was one which they were interested in making. Those are the facts of the case according to my apprehension of them. Now the legal question which emerges is this: Is the putting forth of such a statement by the Defendants made actionable by the fact that it will be misapprehended by some persons, and that the Plaintiffs will by reason of such misapprehension suffer loss. In my opinion that question must decisively be answered in the negative. It appears to me that to answer it in any other way is to interfere with the undoubted right of Her Majesty's subjects to use their own names and to make statements of fact which they are interested in making, and which they commit no wrong in making. If we were to hold that a cause of action arose from the misapprehension of the Plaintiffs' customers, we should be doing this, we should be creating a cause of action against the Defendants by reason of the carelessness or stupidity of the Plaintiffs' customers. Now I know of no principle of law or equity which creates such a cause of action as that. I invited Mr. *Moulton* to tell me whether the cause of action was equitable or legal. He said it was equitable. I know of no such equity as the one which I have just stated. We must regard again the result of the affirmative of the proposition I have stated. It would be a perpetual interference with the legitimate and honest use by a man of his own name, an interference which I think is entirely novel to the law of *England.*

With regard to the authorities, I shall say very little. It appears to me that the Plaintiffs' contention is diametrically opposed to the well-known case of *Burgess* v. *Burgess* (1). It can

(1) 3 D. M. & G. 896.

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stand neither with the judgment of Lord Justice *Knight Bruce* nor with the judgment of Lord Justice *Turner*, and further, I am of opinion that the cases which have been cited in support of the proposition are not relevant. The assumption and use of a trade-mark is not the statement of an existing fact. And again, the creation and assumption of a fancy title for a new company is not the stating of a fact, and it may well be, especially having regard to the section of the *Companies Act* which prohibits the registration of companies with similar names, that the Court may interfere to prevent promoters of a company assuming a name which is sure to result in deception. I think, therefore, that there is no authority in favour of the Plaintiffs' contention and there is distinct authority against it. On the question of law which has been raised and discussed I hold that the Plaintiffs are plainly wrong.

But to me they seem scarcely, if at all, less wrong in point of fact, because, to my mind, it has not been proved in the way in which it ought to be proved to justify the granting of such an injunction, that the use by the Defendants of their firm name will be so misapprehended by any considerable number of persons as to result in any substantial or considerable loss, or any loss by the Plaintiffs which ought to be regarded at all by the Court.

The evidence is to my mind of the most unsatisfactory description: a large number of gentlemen, no doubt of eminence and high position in their trades, come forward and swear one as much like the other as is conceivable. There are slight variations, no doubt, in the affidavits, but substantially they come and swear in the same words. I think the case ought to have been approached with totally different evidence if we were to find the point of fact in favour of the Plaintiffs. We should have been shewn to what extent the two trades were identical. We should have been shewn in what way the deception would operate. We have to bear in mind in this case that it is not a new firm which has started into existence. We have not to measure the use of the word "*Turton*," but we have only to measure the effect of the change from "*Turton & Co.*" to "*Turton & Sons.*" Much of the evidence goes to shew that the confusion arises from the name

of "*Turton*," because sometimes one and sometimes the other was addressed "*Turton & Co.*" And further than that it is in evidence that they have distinct trade-marks. To what extent are those trade-marks used in the orders which are given? I have no doubt they are extensively used. To what extent is it conceivable that the engineers who know all about the different firms will either ultimately be deluded or for any length of time be deluded by the likeness of the two names?

I think, therefore, that the case breaks down entirely upon the evidence, and I repeat that if the Plaintiffs desired to maintain their case they should have produced a very different kind of evidence from that which they have produced. They have endeavoured rather to support this case by a large body of compurgators than by evidence relevant to the issue which was to be decided. I think, therefore, that the appeal should be allowed, and the action dismissed with costs.

Everitt, Q.C.:—

I ask that the costs should be on the higher scale. My friends persuaded the learned Judge below that the case was of the greatest importance and that the costs should be on the higher scale, and he gave them. Therefore I ask that your Lordships will do the same.

FRY, L.J.:—

Mr. *Hardy* will hardly resist that, I think.

Solicitors for Plaintiffs: *Johnson, Weatherall & Sturt*, agents for *Burdekin & Co., Sheffield.*

Solicitors for Defendants: *Pattison, Wigg & King*, agents for *Broomhead & Co., Sheffield.*

M. W.

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May 28, 29.

In re CONTRACT BETWEEN FAWCETT AND HOLMES.

Restrictive Covenant—Omission of Words of Limitation—Misdescription—Condition as to Compensation for Errors—Specific Performance with Compensation.

F., a builder, bought one lot of an estate laid out for building, and covenanted with the vendors that "he, his heirs, executors, administrators, and assigns," would make certain payments and do certain acts in respect of the property purchased, and the covenant proceeded "and the said *F.* on erecting any building on the said land shall only erect" buildings of a certain description:—

Held (affirming the decision of *North*, J.), that the restrictive covenant was only a personal covenant binding on *F.*, and that a purchaser from *F.'s* devisees could not object to the title on the ground that this covenant had not been disclosed.

Property was put up for sale under the description of a "messuage situate in *T. Street*, with the builder's yard, stables, and premises as lately in the occupation of *F.*, and containing 1372 square yards." There was a condition that errors of description should not annul the sale, but that if they were pointed out before completion compensation should be allowed for them. The property had originally contained 1372 square yards, but *F.*, the owner, before building had sold off in 1870, 339 square yards, so that the property contained only 1033 square yards, which were separated by a wall from the 339 yards, and were fenced round and well-defined:—

Held (affirming the decision of *North*, J.), that the purchaser had got substantially what he had contracted to buy, that the deficiency of quantity, though considerable, did not so affect the substance of what he had bargained for as to take the case out of the condition, and that he must complete with compensation.

The rule laid down by *Tindal*, C.J., in *Flight* v. *Booth* (1), as to the nature of the misdescription which will entitle a purchaser to rescind notwithstanding a condition for compensation, approved and applied.

THIS was an appeal by a purchaser from an order of Mr. Justice *North* in Chambers, overruling objections to the title.

The vendors were trustees of the will of *George Fawcett*, a builder, who had in 1870 bought the fee simple of a plot of land in *Wakefield* containing 1372 square yards, and bounded on the east by *Teall Street*, and on the west by *Brook Street*, and on the north by property of *W. W. Speight*, and on the south by other property of the then vendors. By the purchase-deed dated the 1st of March, 1870, *Fawcett* "for himself, his heirs, executors,

(1) 1 Bing. (N.C.) 370, 377.

administrators, and assigns," covenanted with the then vendors, their heirs, and assigns, that "he and his heirs, executors, administrators, and assigns" would form or pay half the expense of forming sewers under *Teall Street* and *Brook Street*, so far as they were co-extensive with the land, and would make such pavements and roads as therein mentioned, and for ever, after the drains pavements and roads were made, maintain them until they were taken to by the local board, and also would, when required by the vendors or their agents, fence off the plot from the adjoining property, or the streets or roads formed or to be formed on it, "and the said *George Fawcett* on erecting any building on the said land fronting to *Teall Street* shall only erect messuages or dwelling-houses thereon well built, and the same in the frontage to *Teall Street* shall be of a good kind, and not less than three stories high, and of the same height as the buildings now standing on the adjoining land on the north side of the said plot of land belonging to the said *W. W. Speight*."

On the 2nd of March, 1870, *Fawcett* sold and conveyed to the above-named *W. W. Speight* 339 square yards of this land, forming a slip running from front to rear and adjoining *Speight's* land, thus reducing his own plot to 1033 square yards.

Fawcett shortly afterwards built upon the remainder of the land a house known as *Quarry House*, and lived in it till his death. It was alleged that the house he had built was not conformable to his covenant, but it was not alleged that the persons who sold to him had ever made any complaint.

On the 13th of July, 1888, the trustees of *Fawcett's* will put up for sale in lots various properties of *Fawcett*. *Quarry House* formed Lot 1, and was described as follows:—

"All that messuage or dwelling-house situate in *Teall Street, Wakefield*, with the builder's yard, stables, and premises, as lately in the occupation of *George Fawcett*, and containing 1372 square yards."

The trustees were not, until after the sale, aware of *Fawcett's* sale to *Speight*.

The 13th condition of sale was as follows:—

"The property is believed and shall be taken to be correctly

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described, but if any error, misstatement, or omission in the posters, plans, or particulars, or in the special or these general conditions, be discovered, the same shall not annul the sale, but, if pointed out before the completion of the purchase, and not otherwise, compensation shall be allowed by the vendor or purchaser as the case may require. The amount of such compensation shall be settled by arbitration under the last clause hereof."

Holmes was the purchaser of Lot 1, and on the day of sale he went over it, but did not take any measurements. He afterwards took objections to the title on the ground that the property was subject to restrictive covenants which had not been disclosed, and on account of the deficiency of quantity. He deposed that he entered into the contract relying on the representation that the property contained 1372 square yards, and that if he had known it to contain only the actual quantity he would not have become the purchaser, as the area would have been too small for his business of a hay and straw dealer.

The vendors took out a summons under the *Vendor and Purchaser Act*, 1874, asking for a declaration that a good title had been shewn.

On the 11th of February, 1889, Mr. Justice *North* in Chambers made an order declaring that the objection on the ground of the restrictive covenant was not valid, "as such covenant only relates to buildings erected or to be erected by the said *G. Fawcett*," and that the objection on the ground of deficiency of quantity was not a valid objection, and that the purchaser ought specifically to perform the contract, and was entitled to compensation for the misdescription, such compensation to be ascertained in manner provided by the contract.

The purchaser appealed from this order, and the appeal was heard on the 28th and 29th of May, 1889.

Giffard, Q.C., and *Methold*, for the appeal:—

We contend that the restrictive covenant binds all persons who take the land with notice of it. Heirs and assigns, it is true, are not mentioned, but the purpose of the covenant obviously is to prevent the land being built upon otherwise than subject to

these restrictions. We shall then be restricted as to building, and may be liable for *Fawcett's* having built in a manner not conformable to the covenant. The nondisclosure of this covenant is therefore a fatal objection to the title.

As regards the second point, no doubt the 13th condition is very wide in its terms; but on the other hand the deficiency in quantity is very great. We get 1033 square yards instead of 1372, and a compensation clause does not apply where the purchaser does not substantially get what he bargained for. The purchaser knows what space he wants for the purposes of his business; he sees a property which he thinks suitable; he is told that its extent is 1372 yards, which is enough for his purposes, and then he finds out, after purchasing, that the extent is only about three quarters of what the vendor represented. In *Flight* v. *Booth* (1) the effect of a restrictive covenant was incorrectly stated in the particulars, and the purchaser was held entitled to be released from his bargain, though there was a condition as to mistakes not vitiating the contract, and it was held that where it is to be inferred that the purchaser would not have purchased at all had he known the truth, the condition does not apply. *Dobell* v. *Hutchinson* (2) proceeds on a similar principle. In *Whittemore* v. *Whittemore* (3) a condition that there should be no compensation for errors was held not to apply where there was a great deficiency. In *In re Arnold* (4) a purchaser was let off his purchase in spite of a similar condition as to misdescription, because the vendor was only entitled to four-sevenths of a piece of land, which was a small part of the property sold.

[FRY, L.J.:—Here you get all you saw.]

Where a description includes something which the purchaser cannot see, as well as what he can see, it is not just to hold him bound to complete because he will get all he saw.

Dunham, for the vendors:—

The change of language in the covenant shews that the covenant as to building was a mere personal covenant by *Fawcett*

(1) 1 Bing. (N.C.) 370.
(2) 3 A. & E. 355.
(3) Law Rep. 8 Eq. 603.
(4) 14 Ch. D 270.

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which does not affect the purchaser. Moreover, any breach has been waived. Then as to the misdescription. In *Whittemore* v. *Whittemore* (1) the difference in quantity was much greater than in the present case. Moreover, the purchaser was not asking to be released from his bargain. *In re Terry and White's Contract* (2) shews the way in which *Whittemore* v. *Whittemore* is to be understood. The purchaser was not objecting to complete, but only objecting to complete without compensation. In *Ayles* v. *Cox* (3) it was held that the condition did not apply where property sold as copyhold turned out to be partly freehold; but there the property was different in nature. *In re Terry and White's Contract* shews that a condition of this nature is to be construed like any other contract, and there is no authority shewing that as a matter of construction such a condition does not extend to large errors. The only question then is, whether the Court, according to the principles applicable to specific performance, will enforce the contract against the purchaser if the error is considerable; and there is no authority shewing that it will not, where there is a clause like condition 13, and there is some authority that it will. *Cordingley* v. *Cheeseborough* (4) recognises that doctrine: *Powell* v. *Elliot* (5).

[FRY, L.J., referred to *Price* v. *Macaulay* (6).]

Giffard, in reply:—

Cordingley v. *Cheeseborough* shews that a great deficiency of quantity will take a case out of a condition as to compensation, and it is in our favour, though it must be admitted that the deficiency there was much greater than here.

[LORD ESHER, M.R., referred to *Scott* v. *Hanson* (7).]

Portman v. *Mill* (8) shews that a great discrepancy of quantity will take away the right to specific performance at the suit of the vendor. It makes a difference whether the vendor or purchaser is suing, as is shewn by *Cordingley* v. *Cheeseborough*.

(1) Law Rep. 8 Eq. 603.
(2) 32 Ch. D. 14.
(3) 16 Beav. 23.
(4) 4 D. F. & J. 379.
(5) Law Rep. 10 Ch. 424.
(6) 2 D. M. & G. 339.
(7) 1 Russ. & My. 128.
(8) 2 Russ. 570.

LORD ESHER, M.R.:—

In this case property was put up for sale under conditions of sale, and it is not disputed that the Plaintiff bought Lot 1 subject to those conditions. The 13th condition provided that if any error, misstatement, or omission in the posters, plans, particulars, or conditions, should be discovered, the error should not annul the sale, but if it was pointed out before completion compensation should be allowed for it. The question now raised is whether under the circumstances of the present case the Court will enforce the contract at the suit of the vendors, they being willing to make compensation.

The purchaser takes two objections: First, that the property was sold without notice of its being subject to any restrictive covenants, and that it is subject to a covenant which would restrict him from building as he pleases on the property. In the deed by which the property was conveyed to *Fawcett*, the testator of the vendors, there is a covenant restricting him from building otherwise than in a particular way, and the question is whether this was a mere personal covenant by him, or a covenant intended to bind all persons who derived title from him. When we look at the conveyance we find that it contains a covenant by *Fawcett* that "he, his heirs, executors, administrators, and assigns," will do a number of acts, but when we come to the restrictions on building the words of limitation are omitted. It may be that in some conveyances those words though left out might be implied, but here the circumstances point to the opposite view. *Fawcett* was a builder, and it may well be that the then vendors, expecting that he would forthwith build on the plot, wished to insist that he personally should only build upon it in a particular way, and not to go any further, for the more stringent the restrictions you impose on property are, the less price you get for it. There is nothing in the present case to lead to the conclusion that the words ought to be carried beyond their letter. The covenant then is to be taken as a mere personal covenant by *Fawcett*, and does not affect the present purchaser. This objection therefore fails.

The objection arising from the misdescription of the property presents greater difficulty. The property was sold under the

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description of "All that messuage or dwelling-house situate in *Teall Street, Wakefield,* with the builder's yard, stables, and premises as lately in the occupation of *George Fawcett,* and containing 1372 square yards." It is not denied that every part of this description is correct except "containing 1372 square yards." This is incorrect, for the property only contains 1033 square yards. When we look at the plan we find a dwelling-house with a yard and stables surrounded by a wall—a messuage with a curtilage—but there is in the particulars an error in describing it as containing 1372 square yards. Now the 13th condition provides that any error, misstatement, or omission in the particulars shall not annul the sale, but that if it is pointed out before completion compensation shall be allowed. If the misdescription is within that condition the vendors must have specific performance allowing compensation. But if the error is such as not to be within the condition, it would be difficult to say that the vendor could have specific performance on the terms of giving compensation, unless the error is a trifling one.

The principal question, then, is, whether the error in the present case comes within the condition. It is contended on the one side that the condition applies, however great the error may be; it is contended on the other side that the condition only applies where the error is trifling. I think that neither view is right. Contracts, substantially in the same terms, have often been before the Courts, and have not been construed according to either of those extreme views. The Courts have said that such a condition is not applicable to every misdescription, for instance it would not apply to a fraudulent one, nor to one the compensation in respect of which could not be ascertained. Are there any other kinds of misdescription to which it will not apply? I think that in *Flight* v. *Booth* (1), *Tindal,* C.J., lays down a rule which is easy to be understood though often difficult of application. "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescrip-

(1) 1 Bing. (N.C.) 370, 377.

tion, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." This is a negative proposition, but a pregnant one. If the error is of such consequence that it may be reasonably supposed that but for the misdescription the purchaser would not have bought, the error is not within the condition. In each case therefore the question depends on the view of the Court as to the importance of the misdescription. Is, then, the error in the present case such as to fall within the rule laid down by *Tindal*, C.J. The subject matter here is "All that messuage or dwelling-house situate in *Teall Street*, with the builder's yard, stables, and premises, as lately in the occupation of *G. Fawcett*." Is the erroneous addition "and containing 1372 square yards" material to the substance of the contract? Looking at what was described to the purchaser did he get substantially what he contracted for? Did the misdescription go to the essence of the contract and materially alter the substance of it? I agree with Mr. Justice *North* that it did not, and the misdescription is therefore within the condition, and the purchaser must complete with compensation. If there had been no compensation clause the Court would have had to deal with the case according to the inherent powers of a Court of Equity, but here the case is within the terms of a contract into which the parties have entered, and the Court must compel the purchaser to fulfil it.

I do not think that the cases referred to, except *Flight* v. *Booth* (1), have much to do with the present case, except that they dispose of some of the points raised in argument, as, for instance, the point that the Court will never decree specific performance with compensation for a large error at the suit of a vendor. *In re Arnold* (2) was not like the present case. There the error was held to be so important as not to come within the conditions. Lords Justices *Bramwell* and *Baggallay* cannot have intended to overrule all the old decisions in equity, though they use some expressions tending towards the view that specific performance with compensation will only be decreed if the error is trifling. *In re Terry and White's Contract* (3) appears to me to have nothing to

(1) 1 Bing. (N.C.) 370. (2) 14 Ch. D. 270. (3) 32 Ch. D. 14.

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do with the present case. I am surprised that I can ever have given the judgment there attributed to me; but the case was a complicated one, turning on the combined effect of several conditions, and is no guide in the present case.

COTTON, L.J.:—

This is an appeal by the purchaser from a decision of Mr. Justice *North*, on an application by the vendors to have it declared that the purchaser is bound to complete his contract with compensation. The purchaser takes two objections, the first of which is, that the property is subject to a restrictive covenant entered into by *Fawcett*, the testator of the vendors. In terms, that covenant was only that *Fawcett* would not build except in a particular way. It was included in a covenant which provided that *Fawcett*, his heirs, executors, administrators and assigns, would do certain acts. In my opinion the alteration of the terms shews a difference of intention. *Fawcett* was a builder, who was expected shortly to build on the property, and the covenant, in my opinion, is only a personal covenant as to what he would do, and the only effect of his breaking it would be to make him or his representatives liable to an action, but could not affect the purchaser.

The other objection is more difficult. It is said that the purchaser does not get nearly the quantity of land he bargained for, and that the discrepancy is so great as to take the case out of the condition as to compensation. The particulars contain a clear and correct description of what is sold, followed by a misdescription as to quantity. It appears to me that the misdescription does not affect the substance of what the Petitioner intended to purchase. The property was separated by a wall from the portions which *Fawcett* had sold. I do not say that such a difference of quantity as what exists here could not in any case alter the substance of what a purchaser intended to buy, but here, what he intended to buy was a well-defined and fenced-off property, consisting of a house, yard, and outbuildings. Now, in *Dyer* v. *Hargrave* (1) Sir *W. Grant* says, "It is impossible to refuse a performance of this contract. It is much too late to

(1) 10 Ves. 505, 507.

contend, that every variance from the description will enable a man to resist the performance. The principle is, that if he gets substantially that, for which he bargains, he must take a compensation for a deficiency in the value." This rule has been followed in subsequent cases: In *Flight* v. *Booth* (1) a restrictive covenant purported to be set out in the particulars, but it was really of quite a different nature. Now, a purchaser, of course, is entitled to have the land conveyed to him free from all restrictive covenants except those subject to which he bought. *Tindal*, C.J., said: "Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones* v. *Edney* (2), where the subject-matter of the sale was described to be 'a free public-house,' while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal." What the vendor there could convey to the purchaser was not in substance the thing which the Petitioner had contracted to buy. In *Dobell* v. *Hutchinson* (3) the vendor had sold a house and yard, and it turned out that he was only tenant from year to year of the yard, which was essential to the enjoyment of the property. The Court said: "As to the second question, we are of opinion that the yard, being proved to be an essential part of the premises, and being held only from year to year, instead of a term of twenty-three years as stated in the particulars, and at a separate rent, the defect was clearly not matter of compensation." In *In re Arnold* (4) the petitioner could not get in substance what he had contracted to buy. It turned out that the vendor had only four undivided sevenths of a piece of land, which was from its situation a very important part of what was offered for sale. I do not think that Lord Justice *Baggallay*, in the remarks at the end of his judgment, meant to lay down that it was only in the case of want of title to a little part of land in a remote part of the property that the purchaser could be ordered to complete with compensation. I am of opinion that the second objection also fails.

(1) 1 Bing. (N.C.) 370, 377.
(2) 3 Camp. 285.
(3) 3 A. & E. 355, 372.
(4) 14 Ch. D. 270.

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FRY, L.J.:—

I am of the same opinion, and confine myself to saying that in my opinion, the rule applicable to these cases cannot be laid down more accurately than was done by *Tindal*, C.J., in *Flight* v. *Booth* (1). In the present case, I think, the purchaser gets substantially what he contracted to buy, and must complete with a compensation for deficiency in quantity.

Solicitors: *Emmet, Son, & Stubbs*, agents for *Wilson & Leatham, Wakefield*; *J. T. Watson*, agent for *B. W. Kemp, Wakefield.*

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Company—Rectification of Register of Shareholders—Invalid Allotment of Shares—Irregular Appointment of Quorum of Directors—Attempted Ratification after Repudiation by Allottee—Qualification of Directors—Companies Act, 1862, *s.* 35 [*Revised Ed. Statutes, vol. xiv., p.* 210].

The articles of association of a company excluded Table A to the *Companies Act*, 1862. They provided that the shares should be allotted by the directors; that the qualification of a director should be the holding of at least forty shares; that the directors should not be more than ten nor less than three in number; that the first directors should be appointed by the majority of the subscribers to the memorandum of association; and that the directors might determine the quorum necessary for the transaction of business. On the 22nd of October the seven subscribers to the memorandum met and unanimously appointed four persons directors. On the 24th of October *S.* applied for 100 shares. On the same day the first meeting of directors was held, at which two only of the four directors were present. No sufficient notice of this meeting had been given to all the directors. They resolved that two directors should form a quorum, and then proceeded to allot shares, including 100 to *S.* They adjourned the meeting till the next day. *S.* received notice of allotment on the 24th. At this time none of the directors had any shares, but at the adjourned meeting on the following day forty shares were allotted to each of them. On the 25th *S.* gave notice to the company that he withdrew his application. On the 25th the meeting was further adjourned to the 26th. On the 26th three directors were present, and one of them, who had been absent on the 24th, expressed in writing his approval of the resolution as to a quorum. At this meeting the former allotments were confirmed. The other absent

(1) 1 Bing. (N.C.) 370.

director on the same day wrote an approval of the resolution as to a quorum, and it was received by the company on the 27th. On application by *S.* to have his name removed from the register:—

Held, by *North*, J., that the two directors had no power to appoint themselves a quorum, and that, consequently, the allotment of shares to *S.* was invalid, and that it could not be ratified after *S.* had withdrawn his application for shares, but that the allotment, if it had been made by all the four directors, would not have been invalid merely because they had not previously acquired any qualification by the holding of shares.

Held, by the Court of Appeal, that assuming every other point to be decided in favour of the company, the allotment was invalid on the ground that notice of the meeting of the 24th had not been given to all the directors, that this meeting was therefore irregular, and the adjourned meeting of the 26th was therefore equally irregular.

MOTION, under sect. 35 of the *Companies Act*, 1862, to rectify the register of members of the above company by removing the name of *W. J. Steele* therefrom as the holder of 100 shares, on the ground that no formal and binding allotment of shares to him was ever made.

The company was registered on the 20th of October, 1888. The articles of association contained the following clauses:—

(1.) "The regulations contained in the Table A. to the first Schedule to the *Companies Act*, 1862, shall not apply to this company, except so far as the same may be repeated, embodied, or contained in these articles."

Clause 3 confirmed and adopted an agreement dated the 17th of October, 1888, described in the memorandum of association.

(70.) "Subject to the said agreement of the 17th of October, 1888, the shares shall be allotted by the directors to such persons, at such times, on such terms, and in such manner as they shall think proper."

(74.) "The directors shall not be more than ten or less than three in number."

(75.) "The qualification of a director shall be the holding of at least forty shares."

(80.) "The first directors shall be appointed by the majority of the subscribers to the memorandum of association."

(91.) "The business of the company shall be managed by the directors."

(96.) "The directors shall hold meetings for the dispatch of

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business at such times and places, and may adjourn and otherwise regulate such meetings, as they think fit, and may determine the quorum necessary for the transaction of business. Questions arising at any meeting shall be decided by a majority of votes, and, in case of an equality of votes, the chairman shall have a second or casting vote."

(98.) "There shall be a chairman of the board. The first chairman and all subsequent chairmen shall be elected by the board from their own body."

(100.) "If at any time there shall be no chairman, or the chairman is not present at the time appointed for holding a board meeting, the directors present shall choose one of their number to be chairman of such meeting."

(101.) "The directors may delegate any of their powers to committees, or two or more members of their body, as they may think fit."

(104A.) "All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as chairman, or as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if such person had been duly appointed, and was qualified to be a director or chairman."

On Monday, the 22nd of October, 1888, a meeting of the subscribers to the memorandum of association was held, at which all the seven subscribers were present, and the following resolution was passed unanimously, "that the following gentlemen be appointed directors of the company: Lord *Inchiquin*, Captain *Skewis*, *Matthew Loam*, *Richard Wood*, and *J. H. Hoyle*, the latter gentleman will take his seat after allotment."

On Wednesday the 24th of October the first meeting of the directors was held. The only directors present were Captain *Skewis* and *Wood*. The minutes of the meeting shewed that *Wood* acted as chairman; that a resolution was passed that two should form a quorum; that a letter from Mr. *Loam* to Captain *Skewis* dated the 23rd of October was read authorizing Captain *Skewis* to act for *Loam* in any matters relating to the company, and to sign any documents; and that a resolution was passed that

Lord *Inchiquin* be appointed chairman of the company. The two directors then proceeded to allotment on certain applications for shares which were specified, one of them being an application by *Steele* for 100 shares, and the meeting was adjourned to the following day. At this time no allotment had been made to any of the directors, and no allotment was made to any of them till the adjourned meeting on the 25th, when an allotment of forty shares was made to each of them.

On the evening of the 24th of October *Steele* received notice of the allotment, and on the 25th of October his solicitors, on his behalf, wrote to the company withdrawing his application for shares. On the 25th of October the adjourned meeting was held, Mr. *Wood* and Captain *Skewis* being present. The minutes of the meeting of the 24th of October were read and confirmed, some further allotments of shares were made, including allotments to the directors, and the meeting was adjourned till the next day, the 26th of October. The adjourned meeting was held on that day, and the directors present were Mr. *Wood* (in the chair), Mr. *Loam*, and Captain *Skewis*. The minutes of the meeting of the 25th were read and confirmed, and *Steele's* letter of withdrawal was read. Mr. *Loam* handed in the following memorandum addressed to the directors and signed by himself: "I hereby concur in and approve of the following resolution by you at your first meeting, viz. 'Resolved that two directors form a quorum.'" Some further allotments were made, and it was resolved that all the previous allotments should be confirmed. On the same day Lord *Inchiquin* signed a similar memorandum to that of Mr. *Loam*, and it was transmitted to the secretary on the 27th of October.

Lord *Inchiquin* did not receive any formal notice of the meeting of the 24th of October. Evidence of a very loose nature was given to the effect that shortly before the meeting of the 24th of October he had been told that it was intended to hold it, and that he had said he was going to *Ireland* and could not attend any meetings in the week beginning on the 21st of October. It appeared that he had gone to *Ireland*, and was there when the meetings were held.

The motion was heard before Mr. Justice *North* on the 2nd of April, 1889.

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Napier Higgins, Q.C., and *Farwell*, for the motion:—

The allotment was invalid. (1) There was no duly constituted board of directors at the time when it was made; and (2), if there was, there was no proper quorum to make the allotments.

(1.) None of the directors was qualified by the holding of any shares. There is no provision in the articles that the clause relating to the qualification of directors shall not apply to the original directors. At any rate the directors should have agreed to take the proper number of shares, or they might have allotted to themselves first.

(2.) Two directors could not appoint the quorum; this could only be done by all the four directors present at the same meeting. Till a quorum was validly fixed shares could not be allotted except by the whole board: *Lindley* on Partnership (1); *In re London and Southern Counties Freehold Land Company* (2); *Howbeach Coal Company* v. *Teague* (3).

There was no board of directors until a chairman was appointed.

The directors could not ratify the invalid allotment after the application for the shares had been withdrawn.

Cozens-Hardy, Q.C., and *W. Baker*, for the company:—

Clause 101 of the articles enables the directors to delegate their powers. The ratification related back to the date of the allotment, and made it valid. When the directors were nominated by the subscribers to the memorandum the effect was the same as if they had been named as directors in the articles.

A majority of the directors had power to act, and the chairman had a casting vote: *York Tramways Company* v. *Willows* (4).

NORTH, J.:—

In my opinion this allotment is as bad as it well could be. [His Lordship referred to clauses 70, 74, and 75 of the articles, and continued:—] I think there is nothing in the point that the directors had not acquired any qualification, for I do not see how a person can acquire shares by allotment till there is some one

(1) 4th Ed. p. 244.
(2) 31 Ch. D. 223.
(3) 5 H. & N. 151.
(4) 8 Q. B. D. 685.

who is capable of making an allotment to him. Clause 75 cannot therefore apply to an allotment of shares by the first directors. [His Lordship then read clauses 91 and 96, and continued:—] Who are to "determine the quorum necessary for the transaction of business?" "The directors." I do not see anything which indicates that any number of directors who might happen to be present at the first meeting of the board are to have the power of doing that. [His Lordship then referred to clauses 98 and 100, and continued:—] Then what took place was this. The subscribers to the memorandum of association appointed five gentlemen to be directors of the company, adding with regard to the fifth, Mr. *Hoyle*, "the latter gentleman will take his seat after allotment." The time therefore for his taking his seat had not arrived, and I take it that that resolution amounted to an appointment of the first four as directors for the purpose of making an allotment, and I think, therefore, that those four gentlemen could have made a valid allotment before Mr. *Hoyle* joined the board. That resolution was passed on the 22nd of October, and the first meeting of the directors took place on the 24th. Only Captain *Skewis* and Mr. *Wood* were present, and the minutes state that Mr. *Wood* was chairman, but there is no resolution appointing him chairman. Then it was resolved that two directors should form a quorum. In my opinion there is nothing in the articles which could authorize the two directors who were present on that occasion to appoint themselves as a body competent to act for and represent and bind the company, who, according to the articles, were to be bound either by the directors or by a quorum validly and properly appointed by the directors. In my opinion these two gentlemen had no authority to appoint themselves a quorum in this way. Then, is the matter improved by the letter written by Mr. *Loam* to Captain *Skewis*, authorizing him to act for him in any matters relating to the company, and to sign any documents that might be required, that is, an authority from one director to another purporting to give that other director double authority? Of course, the thing is absurd. An absent director could not confer all his powers on another director who was present at the meeting, the absent director not having been told what was going to be done, and

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not being consulted about it or hearing the reasons *pro* and *con*. Then there was a resolution appointing Lord *Inchiquin* chairman of the company. Whether they had power to do that, I think, is doubtful, but I do not think that alone would have made the allotment bad if it had been otherwise good.

Then Lord *Inchiquin* some time in October signed this minute: "Resolved that two directors of the company form a quorum." and Mr. *Loam* wrote a letter expressing his concurrence in the resolution appointing a quorum. In my opinion they had no more power to do this than the other two directors had originally to appoint the quorum. Then it is said that the directors afterwards ratified what had been done as to the allotment of shares. Unfortunately, however, whatever the effect might otherwise have been in the meantime *Steele's* application had been revoked. It was entirely in the power of an applicant, whose application had not been validly accepted, to revoke it; the directors could do nothing afterwards to set up an application which had been validly revoked in the meantime.

Then it is said that clause 104A of the articles applies. But there was no defect in the appointment of the two directors who were present, because, as I have held, the qualification was not a necessary preliminary. The defect arises from the fact that two persons, who had no power to bind the others, proceeded to act as if they had been the whole body of the directors, and to do all that could be done by two whether they chose to make themselves a quorum or not. The protection given by clause 104A does not therefore apply. The Applicant's name must be removed from the register, and the deposit which he has paid must be returned.

W. L. C.

C. A.

The company appealed from this decision, and the appeal was heard on the 29th and 31st of May, 1889.

Rigby, Q.C., *Buckley*, Q.C., and *W. Baker*, for the appeal:—

When notice of a meeting is given a majority of those present can bind the body. Those who do not attend leave the business to those who do: *Attorney-General* v. *Davy* (1). Clause 96 must

(1) 2 Atk. 212.

be read as saying that *A.*, *B.*, *C.*, and *D.*, the appointed directors, are to hold meetings in such manner as they shall think fit. Then, as Lord *Inchiquin* said he could not attend, the others had power to act without him.

[FRY, L.J.:—"As they think fit." Must they not meet in order to think?]

In *York Tramways Company* v. *Willows* (1), a meeting of four out of seven subscribers was held competent to bind the company. There does not appear to be any case which holds that less than a majority will be sufficient; but on principle there is no reason why it should not. The principle must be, that when all are summoned, then, subject to any rule as to quorum, those who come may act. *Loam's* assent made the resolution of the 24th valid if it was invalid before, and the ratification relates back: *Bolton Partners* v. *Lambert* (2). There is evidence that Lord *Inchiquin* had verbal notice of the first meeting, and his statement that he could not attend during that week made it unnecessary to give him formal notice.

Napier Higgins, Q.C., and *Farwell*, for the Respondent, were not called upon.

LORD ESHER, M.R.:—

I will assume that every point taken by Mr. *Rigby* and Mr. *Buckley* ought to be decided in their favour except one. That one is this, that according to their own argument it is necessary that all the directors should have had notice of the meeting of the 24th. If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting could not adjourn itself to the 26th. So that the meeting of the 26th falls if the meeting of the 24th was not valid, and the only ground on which it can be contended to be valid is, that all the then qualified directors had notice of it. Now, what happened with regard to Lord *Inchiquin*? First of all, there is no legal evidence of his having said or done anything about the meeting; what it is suggested that he said is mere hearsay. But suppose there

(1) 8 Q. B. D. 685. (2) 41 Ch. D. 295.

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had been evidence that Lord *Inchiquin* had been told that they were going to hold a meeting or meetings during the next week, and had then said, "I cannot be there." It is said that he did so, and that is now relied on as a waiver of the right to notice. In my opinion he could not waive his right to notice. As he was within reach, and it was perfectly possible to give him notice, it was the duty of the directors to give him notice of the meeting. The circumstances existing at the time when he used the words relied on as a waiver might have been wholly altered, or he might have taken a different view if he had had notice of the time and object of the meeting. That notice ought to have been given to him, and there was no such notice. The meeting of the 24th of October was therefore invalid, and I think that is sufficient to determine this case without deciding any of the other points.

COTTON, L.J.:—

I am of the same opinion. Lord *Inchiquin* only went to *Ireland*, and there is a post daily to *Ireland*, so there was no want of means of communication. There is no evidence whatever that any notice was sent to him of the meeting to be held on the 24th, which was the origin of the meeting of the 26th, and in my opinion, assuming that notice to all would have made the meeting held on the 24th a good meeting, yet if in point of fact notice was not given or sent to all the directors when it could have been given to all or sent to all, the meeting was a bad one, and the whole foundation of the argument breaks down. The appeal therefore fails.

FRY, L.J.:—

The proposition which has been very clearly urged before us by Mr. *Buckley* is this, that, when a select body of persons are appointed to do an act, half of them may do the act if the other half have notice of the meeting. I say nothing about the validity or invalidity of that proposition in point of law, except to say that I am not satisfied of its accuracy. It is not necessary to decide it, for the facts do not raise the question, because there

is nothing to shew that notice of the meeting of the 24th of October was given to Lord *Inchiquin*, who was one of the appointed persons.

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Solicitors: *Stretton, Hilliard, & Co.; Burn & Berridge.*

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In re CALLAO BIS COMPANY.

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NORTH, J.
May 10.
C. A.
June 7.

Voluntary Winding-up—Transfer of Business to another Company—Sanction of Court—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 161 [*Revised Ed. Statutes, vol. xiv. pp.* 233, 237].

The sanction of the Court which is required to make a resolution under sect. 161 of the *Companies Act*, 1862, for a transfer of the business of a company to another company valid, in case an order is made within a year for winding up the company by or subject to the supervision of the Court, must be obtained at or after the making such order, and cannot be obtained previously in the matter of the voluntary winding-up.

Decision of *North*, J., affirmed.

THE *Callao Bis Company* was incorporated in 1885 as a company limited by shares, for the purpose of carrying on mining operations in *Venezuela*. Its nominal capital was £200,000, in £1 shares, and nearly all its shares were taken and fully paid up.

On the 18th of March, 1889, the company at an extraordinary general meeting passed the following resolutions:—

"1. That the *Callao Bis Company, Limited*, be wound up voluntarily under the provisions of the *Companies Acts*, 1862–1867.

"2. That pursuant to sect. 161 of the *Companies Act*, 1862, the liquidator be, and he is hereby, authorized to sell and transfer (subject to due provision being made for dissentient shareholders, if any) all the property and assets of the company to a new company, upon the terms of the scheme of reconstruction now submitted to the meeting, and identified by the chairman."

The scheme provided for the formation of a new company, with a capital of £250,000, in £1 shares. The new company was to take over, subject to provision for debts and dissentient shareholders, the assets of the old company, and pay all its debts, and

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was to allot to the liquidator, or his nominees, 196,241 ordinary shares in the new company, credited with 15*s.* per share as paid up, and 3759 preference shares fully paid up, which were to be allotted as therein mentioned to the shareholders in the old company, and such as were not accepted were to be sold by the liquidator.

On the 3rd of April, 1889, another extraordinary general meeting duly confirmed the above resolutions as special resolutions, and appointed a liquidator.

The new company was accordingly formed, under the style of "*Callao Bis, Limited*;" and by an agreement, dated the 29th of April, 1889, between the old company, the liquidator, and the new company, it was agreed that the old company and the liquidator should sell the assets of the old company to the new company upon the terms mentioned in the scheme.

On the 10th of May, 1889, the old company and the liquidator moved before Mr. Justice *North* that the arrangement for sale to the new company, under sect. 161 of the *Companies Act*, 1862, which the liquidator had been authorized to carry into effect by the special resolution, might be sanctioned by the Court.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the motion:—

It is desirable that when a scheme of this kind is being carried out the question whether the sale can be invalidated should not be kept pending for a year. By the last part of the section it is enacted that a resolution shall not be of any validity in the case of a winding-up order being made within a year, unless the sanction of the Court is obtained to it. There is nothing to limit the time at which that sanction is to be obtained. There is ample power given by sect. 138 of the *Companies Act*, 1862, to apply for such order in the voluntary winding-up. There is every reason on matter of justice and convenience that the sanction should be given now.

NORTH, J.:—

I do not feel very clear upon the construction of the proviso. But my strong impression is against the contention of Mr. *Hardy*. And it is better that I should so decide, and that the company

should be able to go to the Court of Appeal, who can settle the question once for all, than that I should decide in their favour and the Court of Appeal should afterwards decide in a different way. Sect. 161 provides that "where any company is proposed to be or is in course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company—" I may pass over the greater part of the section. Near the end there is this proviso: "No special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company or for appointing liquidators." I think that provision was inserted to prevent a doubt which might otherwise have arisen whether the power given by the section applied at all when the company was contemplating or actually taking proceedings for a winding-up beyond the contemplated sale. It seems to me to get rid of this doubt, and to shew that the fact that something more than a voluntary winding-up was being contemplated was not to prevent the company from being wound up altogether voluntarily, within the meaning of the opening lines of the section. Then the section goes on to say: "But if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court." Now I think what is referred to there is an order within the year with reference to proceedings pending or in contemplation when this resolution was passed, and it contemplates continuance of proceedings, indicated by the proviso immediately preceding, though I do not think it is confined to that. The proviso is that when an order is made within a year the resolution is not to have any validity unless it is sanctioned by the Court. I think the words point to a sanction in the branch of the Court that has to do with the compulsory winding-up or winding-up under supervision. That is the natural meaning of the words as they stand, and it would be a rather forced construction to say that they apply to a voluntary winding-up altogether outside the winding-up compulsory or under supervision.

There is this, further. I do not find anything in the Act that

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contemplates an application to the Court in a mere voluntary winding-up for such a sanction as this. It is quite true that it might possibly come within the words of sect. 138, by which power is given to apply in a voluntary winding-up "to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court." Those words are very wide, and might possibly be held to apply to such an application, but they do not contemplate it. I am of opinion that the sanction of the Court contemplated is the sanction of the Court that has control over the winding-up ordered within a year of the passing of the resolution.

D. P.

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The company appealed from this decision, and the appeal was heard on the 7th of June, 1889.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the appeal:—

It is exceedingly inconvenient that the validity of a scheme of this kind should remain doubtful for a year, and we contend that the Court can give its sanction now. A voluntary winding-up is pending, and under sect. 138 "the Court," which by sect. 81 means the Court of Chancery, has the same power to determine any question arising in the matter of the winding-up as if the company were being wound up compulsorily. This is a question arising in the matter of the winding-up, and the Court, therefore, has power to determine it. That section has been held applicable to a point arising under a scheme of this description: *In re Union Bank of Kingston-upon-Hull* (1). In the case of *Ex parte Fox* (2) Lord Justice *James* assumes that an order restraining the company from proceeding under sect. 161 till a dissentient shareholder had obtained security for the value of his shares could be made under sect. 138. There is nothing in sect. 161 to limit the time at which the sanction of the Court may be obtained.

G. F. Hart, for a dissentient shareholder:—

I submit that the Court cannot entertain this application now.

(1) 13 Ch. D. 808. (2) Law Rep. 6 Ch. 176, 186.

Take the grammatical meaning of the words at the close of sect. 161, "unless it is sanctioned by the Court"—not "has been or shall be," but "is" sanctioned by the Court, *i.e.* the Court that makes the winding-up or supervision order. By sect. 145 it is provided that a voluntary winding-up shall not preclude a creditor from obtaining a compulsory order for winding-up; it is to be inferred that a shareholder is precluded, but nothing that the shareholders do among themselves ought to take away the right of a creditor, and here the right of a creditor to get a winding-up in which the assets will be administered ought not to be taken away by anticipation. The 161st section was not meant to take it away. The only object of the proviso at the end is to save the rights of creditors, the scheme is binding on the contributories. The argument on the ground of inconvenience is very strong, but so are the words of the section, and they are not ambiguous enough to make the argument *ab inconvenienti* apply. It is said to be very inconvenient that the new company cannot depend on its title for a year; but that is what the Legislature intended. For a year the creditors retain their right to have the assets of the old company administered. There is also inconvenience in the Appellants' view. A sanction which may so materially affect the rights of other parties ought not to be given in their absence, but no machinery is provided for serving them. When a winding-up order or a supervision order has been made, the case is different, for then the Court has the liquidator before it, who is its own officer. No application like the present has ever been granted under sect. 138, and I submit the section does not apply, for this is not a question arising in the winding-up—it is the whole winding-up. In *Palmer's* Company Precedents (1) is a list of all the applications under sect. 138 that have been granted. *Ex parte Fox* (2) is no authority on the point.

[FRY, L.J.:—It only comes to this, that there was no jurisdiction to make the order unless such jurisdiction was given by sect. 138.

COTTON, L.J.:—I am disposed to think that sect. 138 authorizes the application unless sect. 161 impliedly prohibits it.]

(1) 4th Ed. p. 847. (2) Law Rep. 6 Ch. 176, 186.

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I submit that it does prohibit it, for that on the true construction of sect. 161 the sanction can only be given if a winding-up order or a supervision order is made. It is analogous to an adoption under sect. 146 of proceedings in a voluntary winding-up. The case of *In re Union Bank of Kingston-upon-Hull* (1) was wholly unlike the present; there was a question arising under the winding-up.

Cozens-Hardy, in reply:—

It is urged on the other side that the proviso only saves the rights of creditors; but it evidently makes the resolution bad as regards everybody, unless the Court sanctions it. Dissentient shareholders are to be paid off, and there would be frightful confusion if, after they have been paid, the whole scheme can be upset.

COTTON, L.J.:—

This is an application by way of appeal from an order of Mr. Justice *North*, who has decided that when a resolution has been passed under sect. 161 of the *Companies Act*, 1862, the sanction of the Court cannot be given to it under that section when there is no compulsory or supervision order.

The first question raised was whether sect. 138 gives power to the Court to entertain this application, for if it does not, there is no such power. In my opinion, sect. 138 does give power to apply to the Court in this matter as a question arising in the matter of the winding-up, because this is a question how the winding-up is to be conducted, and how the shareholders are to get the value of their shares, and the sanction of the Court may I think be given under that section, unless the Act points out a different mode of procedure. The sanction of the Court clearly could be given if a compulsory order or a supervision order were made. To have recourse to such an order is inconvenient, but the Legislature does not provide for all the inconveniences which in any particular case may arise in resorting to a remedy which it has provided. In my opinion, the view of Mr. Justice *North*

(1) 13 Ch. D. 808.

unfortunately is correct. Sect. 161 enables a resolution to be passed in a voluntary winding-up, authorizing the liquidator either generally, or in carrying out a particular scheme, to sell the assets and make payment to the shareholders by giving them shares in another company, and it provides that this is to be binding on all members of the company which is being wound up, subject to this proviso, that if any member dissents, he can require the liquidator either to abstain from carrying the resolution into effect or to pay him the value of his shares. No provision is made there for creditors. Then if we look back to sect. 146 we find that when a company is being wound up voluntarily, and an order is then made for winding it up compulsorily, the Court may, if it thinks fit, provide in such order, or in any other order, for the adoption of all or any of the proceedings taken in the course of the voluntary winding-up. That does not apply to the case of a supervision order. But the proviso at the end of sect. 161 applies both to supervision and compulsory orders. In my opinion, what is intended by the proviso is to carry out with reference to such sales as are contemplated by that section, and whether a winding-up order or a supervision order is made, what is provided for generally as regards a compulsory winding-up order in sect. 146. As there is not in sect. 161 anything which points to the sanction being given in the voluntary winding-up, I think the fair construction is this, that a resolution under sect. 161 is to be binding on the shareholders, but that the rights of creditors (who may possibly not know anything about the resolution or see how it will affect their interests) are reserved. It reserves to them this right, that if within a year proceedings are taken which lead to an order for compulsory winding-up or continuing the winding-up under supervision, then the resolution, and consequently the sale made under it, will be of no effect, unless the Court, either by the order directing the winding-up by the Court or the continuance of the winding-up under supervision, or by a subsequent order, directs that the resolution shall be a good resolution. Sect. 161 is not expressed in clear terms, but, in my opinion, what I have stated is its correct construction. It may be that it is inconvenient, but

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it is an inconvenience which must be submitted to. Generally speaking, the only persons who could raise this question and ask for an order which would invalidate the resolution would be the creditors. I am not prepared to say that the Court will never at the instance of a shareholder interfere by making a supervision order, but the Court is very unwilling to do it, and practically the only difficulty is as regards the creditors, who are in no way treated by sect. 161 as intended to be bound by any resolution under it. In my opinion, the appeal fails, and must be dismissed.

FRY, L.J.:—

I am of the same opinion. I am very strongly impressed with the inconveniences of the conclusion at which I have arrived, because I cannot help seeing that it is possible that a sale made perfectly *bonâ fide* may at any time before the end of a year be impeached. At the same time it appears to me that the true construction of the clause is that put upon it by Mr. Justice *North*.

In the first place the words at the end of sect. 161 seem according to their natural meaning to import rather a sanction in a winding-up of the company compulsorily or subject to supervision than a sanction independently of it. The concluding words have this effect, that if an order for winding-up by or under the supervision of the Court be made, the resolution shall be of no validity unless the Court sanctions it, the natural meaning of which is unless the Court, at the time of making the order or by subsequent order, sanctions the resolution. That conclusion, as has been pointed out by the Lord Justice, fits well into the 146th section, which in the case of compulsory winding-up being ordered after the voluntary winding-up has been going on, provides for the adoption, if the Court so thinks fit, of the proceedings in the voluntary winding-up. The effect of this conclusion appears to me to be that a strong pressure is put upon all persons concerned in the framing of these resolutions and the carrying them into effect to make a resolution of such a description, both as regards the law of the case and the substance of the case, as shall secure its receiving the sanction of the Court if the matter

comes to be discussed. If the resolution passed be a fair and reasonable one the purchaser will have little cause to fear.

For these reasons I think that the decision of Mr. Justice *North* is right, and that the appeal must be dismissed with costs to be paid to the shareholder who appears.

Solicitors for the company: *Snell, Son, & Greenip.*

Solicitors for the opposing shareholder: *Gresham, Davies, & Dallas.*

H. C. J.

STIRLING, J.
1889
April 5, 9, 16.

ATTORNEY-GENERAL v. CORPORATION OF CROYDON.

[1889 A. 340.]

Municipal Borough — Public Libraries Acts — Requisition by Ratepayers to Mayor to ascertain Opinions of Ratepayers — Poll taken as to adoption of Acts by issuing Voting Papers to Occupiers — Owners or Occupiers entitled to vote.

Under the *Public Libraries Amendment Act*, 1877, the persons to vote are "the inhabitants who would have to pay the assessment":—

Held, that in cases where owners were made rateable in place of occupiers the occupiers were nevertheless the inhabitants, who would have to pay, inasmuch as the rates paid by the owners are for the purpose of the qualification to vote made attributable to the occupiers by the joint effect of sect. 147 of the *Municipal Corporations Act*, 1882, and sects. 7 and 19 of the *Poor Rate Assessment and Collection Act*, 1869.

Therefore, the mayor of the municipal borough of *Croydon* having received a requisition from ten ratepayers, under the provisions of the *Public Libraries Act*, 1866 (29 & 30 Vict. c. 114), calling upon him to ascertain the opinions of the ratepayers of the borough as to the adoption of the *Public Libraries Acts*, acted properly in issuing, under the provisions of the *Public Libraries Amendment Act*, 1877 (40 & 41 Vict. c. 54), voting papers to the occupiers, and not to the owners, of premises in the borough.

THE borough of *Croydon*, which is coterminous with the parish, was by royal charter, on the 9th of March, 1883, incorporated. In October, 1888, ten ratepayers, acting under the provisions of the *Public Libraries Amendment Act* (*England and Scotland*), 1866 (29 & 30 Vict. c. 114), signed a requisition and addressed it to the mayor, calling upon him to ascertain the opinions of the ratepayers of the borough upon the question of the adoption of the *Public Libraries Acts*. Under the provisions of the *Public Libraries Amendment Act*, 1877 (40 & 41 Vict. c. 54), voting papers were issued by the mayor and sent to the occupiers of premises in the borough, and when they were collected there were found to be 6482 votes in favour of the adoption of the Acts, and 4736 votes against the adoption of them, or a majority of 1746. The mayor having declared the result of the poll, the corporation proceeded to pass resolutions

for the purpose of carrying the Acts into effect. An action was brought against the corporation by the Attorney-General at the relation of *P. H. Gowan* and *R. C. May*, inhabitants and ratepayers of the borough, and this was a motion on their behalf for an injunction to restrain the defendants from carrying into effect the Acts, on the ground that the poll taken by the defendants under the provisions of the *Public Libraries Amendment Act*, 1877 (40 & 41 Vict. c. 54), for the purpose of ascertaining such opinion of the ratepayers, had not been validly complied with.

Buckley, Q.C., and *Percy F. Wheeler*, for the Plaintiffs:—

It is submitted that the voting papers were improperly issued to many of the persons who voted, as, according to the provisions of the Act of 1877 (40 & 41 Vict. c. 54), in cases where the owners of premises in the borough are rated instead of the occupiers, the voting papers should have been issued to the owners as the persons who were legally liable, and who actually paid the rates, and not to the occupiers.

Hastings, Q.C., and *R. S. Wright*, for the Corporation:—

In the first place it is submitted that the declaration of the mayor of the result of the poll was conclusive; and next, according to the true construction of the Public Libraries Acts, the persons entitled to vote for their adoption or not, are those who in reality bear the burthen of the rates—the occupiers—because, though the rates are actually paid by the owners of the premises, they are, as submitted, charged against the occupiers in the shape of higher rents.

[During the arguments, the following statutes were referred to and commented upon:—59 Geo. 3, c. 12, ss. 19 & 20; "*An Act for further promoting the Establishment of Free Public Libraries and Museums in Municipal Towns, and for extending it to Towns governed under Local Improvement Acts, and to Parishes,*" 1855 (18 & 19 Vict. c. 70), s. 3; *Public Libraries Amendment Act* (*England and Scotland*), 1866 (29 & 30 Vict. c. 114), s. 11; *Public Libraries Act* (1855) *Amendment Act*, 1871 (34 & 35 Vict. c. 71, s. 2); *Poor-rate Assessment and Collection Act*, 1869 (32 & 33 Vict. c. 41), ss. 4, 7, 12 and 19; *Application of Funds of Municipal*

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Corporations Act, 1872 (35 & 36 Vict. c. 91), s. 2; *An Act to amend the Public Libraries Acts*, 1877 (40 & 41 Vict. c. 54), s. 3; *Parliamentary and Municipal Registration Act*, 1878 (41 & 42 Vict. c. 26); *Assessed Rates Act*, 1879 (42 Vict. c. 10); *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50); and the cases of *Smith* v. *Seghill* (1), and *Cross* v. *Alsop* (2), were also referred to. The material provisions of the statutes which were referred to are fully set forth in the judgment.]

STIRLING, J.:—

The question which I have to consider in this case is whether the *Public Libraries Acts* have been validly adopted by the municipal borough of *Croydon*. [After stating the facts his Lordship continued:—] The voting papers were issued to the occupiers whose names appeared in the rate book, although within the parish of *Croydon* an order has been made by the vestry, dated the 30th of November, 1869, in pursuance of the *Poor-rate Assessment and Collection Act*, 1869 (32 & 33 Vict. c. 41), "that the owners of rateable hereditaments to which sect. 3 of this Act extends within" the parish "shall be rated to the poor-rate in respect of such rateable hereditaments instead of the occupiers on all" future poor-rates for the parish.

It was stated that if the owners had been furnished with voting papers instead of the occupiers there would have been a difference in the constituency to the extent of 6000 votes or thereabouts, and it was contended that in that way the opinions of persons whose opinions are to be ascertained in accordance with the Act have not been validly ascertained.

That question depends on the construction to be given to the *Public Libraries Acts*, and in particular to the Act passed in 1877 to amend those Acts (40 & 41 Vict. c. 54). Before coming to that Act I must shortly state the provisions of prior Acts, of which there are several, with reference to the establishment of public libraries in municipal boroughs and in other places. The first Act which it is necessary to mention is that of 1855 (18 & 19 Vict. c. 70), which repealed the prior Act of 1850 (13 & 14 Vict. c. 65). The Act of 1885 provided for "the establishment of Free

(1) Law Rep. 10 Q. B. 422. (2) Law Rep. 6 C. P. 315.

Public Libraries" in three classes of districts, first of all in municipal boroughs, in which case the procedure is governed by sect. 4 of the Act. This provides that "the mayor of any municipal borough the population of which, according to the then last census thereof, shall exceed 5000 persons, shall, on the request of the town council, convene a public meeting of the burgesses of the borough, in order to determine whether this Act shall be adopted for the municipal borough," and then after certain provisions as to the calling of the meeting it provides that "if at such meeting two-thirds of such persons as aforesaid then present shall determine that this Act ought to be adopted for the borough, the same shall thenceforth take effect and come into operation in such borough." So that the constituency which in municipal boroughs is to determine the question consists of the burgesses of the borough.

Then in sect. 6 there is provision for the adoption of the Act by the board of any district being a place within the limits of any improvement Act, having such a population as aforesaid, and there also the question is to be determined by a meeting, and the persons who are entitled to attend and to vote at that meeting are the persons assessed to and paying the improvement rate, and by the interpretation clause of the Act the improvement rate means the rates, tolls, rents, income and other moneys raised for the general purposes of the Act. Further, in sect. 8 there is a provision for the adoption of the Act by parishes, and there again the question is to be determined by a meeting, and the persons who are to attend and vote at the meeting are to be ratepayers, and ratepayers by the interpretation clause are defined to mean "all persons for the time being assessed to rates for the relief of the poor of the parish."

The Act of 1855 was amended in the year 1866 by the Act 29 & 30 Vict. c. 114, which did not in any way alter the classes of districts or bodies which are to be entitled to adopt the Act, but it made certain variations in the mode of carrying it out. For example, as regards municipal boroughs the provision of the Act of 1855 as to the mode in which the expenses of executing the Act to be defrayed, is altered by sect. 2, "and the expenses of carrying the said Act into execution in any municipal borough

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may be paid out of the borough rate of such borough, or by and out of a rate to be made and recovered in such borough, in like manner as a borough rate may be made and recovered therein, but the amount so paid in such borough in any one year shall not exceed the sum of one penny in the pound upon the annual value of the property in such borough rateable to a borough rate."

Then sect. 3 enables a public meeting to "be called either on the request of the town council, or on the request in writing of ten ratepayers residing in the borough."

Then in sect. 4 there is a provision for enabling parishes which adjoin any borough, or a district or another parish, also to adopt the *Public Libraries Act* in conjunction with the borough, district or parish so adjoining.

Then an Act amending the Act of 1855 (18 & 19 Vict. c. 70) was passed in 1871 (34 & 35 Vict. c. 71), and thereby another constituency was created.

Sect. 1 provides that "every local board, under the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), and the *Local Government Act*, 1858 (21 & 22 Vict. c. 98), or either of them, is empowered, in like manner as a board under any improvement Act, to adopt and carry into execution the principal Act."

Then sect. 2 provides that for that purpose certain words in the principal Act are to have an extended signification, viz. the word "board" shall mean "any such local board," and the words "improvement rate" shall mean the general district rate levied by any such board, and the word "ratepayers" shall mean all persons assessed to and paying such general district rate.

That is the last Act which had been passed relating to this matter prior to the Act of 1877, which I shall presently consider in detail.

Resting there, it appears that there were four classes of public authorities with power to adopt the Act, first of all "municipal boroughs," in which the constituency consisted of the burgesses; secondly, "districts" under the *Local Improvement Acts*, in which the constituency consisted of persons assessed to and paying the improvement rate; thirdly, "local boards" under the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), and the *Local Government Act* of 1858 (21 & 22 Vict. c. 98), or either of them, in which the

constituency consisted of persons assessed to and paying the general district rate levied by the local board; and fourthly, "parishes," in which the constituency consisted of the persons for the time being assessed to rates for the relief of the poor of the parish. In that state of circumstances the *Public Libraries Act* of 1877 (40 & 41 Vict. c. 54) was passed, and the preamble is this: "Whereas by the *Public Libraries Acts*, 18 & 19 Vict. c. 40, for *Ireland*; 29 & 30 Vict. c. 114, for *England*; and 30 & 31 Vict. c. 37, for *Scotland*, the mode by which the Act is to be adopted is prescribed to be by public meeting, and it has been found that in many cases a public meeting is a most incorrect and unsatisfactory mode, and fails to indicate the general opinion of the ratepayers, and it is desirable to ascertain these opinions more correctly." Stopping there, it is obvious in the first place that that preamble was not framed with very great care, because it omitted all mention of the Act of 1855 (18 & 19 Vict. c. 70) for *England*. It is true that it mentioned the Act of 1866 (29 & 30 Vict. c. 114), which by the last clause of it (11) was "to be taken to be part of the said *Public Libraries Act*, 1855, and construed accordingly." Still the fact remains that the principal Act was omitted, but as regards the construction to be put upon the Act of 1877 by me that is not material, as by a subsequent Act passed in 1887 (50 & 51 Vict. c. 22) it was provided (sect. 6) that the Act of 1877 "shall have effect as if the *Public Libraries Act* of 1855 were recited therein." But beyond that the language is not very precise or accurate, and what is notable is that it was directed to the ascertaining of the general opinion "of the ratepayers," thereby treating the matter as if "the ratepayers" were, in every district which had the power of adopting the *Public Libraries Acts*, the persons who were entitled to attend and vote at the prescribed meeting; whereas in the case of boroughs that was not so, the constituency in them consisting of burgesses, who are not co-extensive with ratepayers, but form a particular class of ratepayers, who must be assessed to rates and have paid them by a certain date: see 45 & 46 Vict. c. 50, s. 9. The sections of the Act of 1877 are these. First, "it shall be competent for the prescribed local authority in any place or community which has the power to adopt one of the above recited Acts, to ascertain the

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opinions of the majority of the ratepayers either by the prescribed public meeting or by the issue of a voting paper to each ratepayer, and the subsequent collection and scrutiny thereof, and any expense in connection with such voting papers shall be borne in the same way as the expense of a public meeting would be borne, and the decision of the majority so ascertained shall be equally binding."

Sect. 2 enables a qualified vote to be given, but that I need not consider: and sect. 3 enacts that "'ratepayer' shall mean every inhabitant who would have to pay the free library assessment in event of the Act being adopted." It was contended that the object of the Act was not to change the constituency by whom the question of the adoption or non-adoption of the Acts was to be determined, but simply to provide a better mode of ascertaining the opinions of the constituency, and I was asked to read the Act as if sect. 3 either had not been inserted or did not apply to this particular case.

I must say that that argument weighed considerably on my mind, and if I could see my way to do so I think it would not be an irrational construction to put upon the Act; but after giving every consideration to the argument it appears to me that the language of the Act would be very much strained, and more strained than, upon a just construction of it, it ought to be. Therefore I come to the conclusion that I ought not to read the Act in that way, but to read it as if in the 1st section there had been inserted instead of the word "ratepayer" the definition of "ratepayer" which is contained in sect. 3, and the language of sect. 1 would then run: "It shall be competent for the prescribed local authority . . . . to ascertain the opinions of the majority of the 'inhabitants who would have to pay the free library assessment in the event of the Act being adopted' either by the prescribed public meeting or by the issuing of a voting paper to each" such inhabitant. In other words I am not prepared to say, having given full consideration to the language of the Act, that the Legislature merely provided a new mode of taking the vote of the old constituency, and did not provide a new mode of adopting the Act as a whole, and therefore it is upon that footing that I propose to consider the case.

The question then arises who in a borough are the inhabitants who would have to pay the public libraries assessment in the event of the Acts being adopted? and for that purpose we have to consider certain other Acts of Parliament. By the 2nd section of the Act of 1866 (29 & 30 Vict. c. 114) "the expenses of carrying the said Act into execution in any municipal borough may be paid out of the borough rate of such borough, or by and out of a rate to be made and recovered in such borough, in like manner as a borough rate may be made and recovered therein."

The statute which regulates the levying of a borough rate is the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50). Sect. 144 contains provisions giving power to the council of a borough to make a borough rate, and to assess (sub-sect. 4) the contributions thereto "on the several parishes and parts of parishes in the borough in proportion to the total annual value of the hereditaments in each parish or part which are rateable to the poor, or in respect of which a contribution is made to the poor-rate."

Then sect. 145 provides that "where a parish is wholly in a borough," as is the case here, "the council may from time to time, if they think fit, order the overseers to pay the contribution of the parish to the borough rate out of the poor-rate made or to be made for the parish."

Then sect. 146 enacts that "where a parish is partly in and partly out of a borough, the overseers, on receipt of an order for payment of money for the contribution of the part in the borough towards a borough rate, which order the council may make as if the whole parish was in the borough, shall assess on and levy from the occupiers of hereditaments rateable to the poor-rate in that part of the parish the amount necessary for the contribution, either as a separate rate, for which the overseers shall have all the powers which belong to them for levying a poor-rate, or with and as part of the poor-rate to which occupiers in that part of the parish are liable in common with occupiers in the other part."

Then comes sect. 147, which is very material. It enacts that "where the vestry of a parish has made or makes, before or after the commencement of this Act, under sect. 4 of the *Poor-rate*

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Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), an order, as in that section provided, to the effect that the owners, instead of the occupiers, of such rateable hereditaments, as therein mentioned, shall be rated to the poor-rate in respect thereof, every such order, while in force after the commencement of this Act, shall be deemed to apply to and include rating to the borough-rate, with the same incidents, conditions, powers, liabilities, and remedies as if the borough-rate were a poor-rate."

In order to appreciate the force of that, we must turn to the *Poor-rate Assessment and Collection Act*, 1869 (32 & 33 Vict. c. 41), and consider the provisions of it.

It provides in sect. 3 that in certain cases owners of the rateable hereditaments may agree to pay the poor-rates, and be allowed a commission, not exceeding 25 per cent., on the amount thereof. Then sect. 4 provides that in certain cases the vestry of any parish may order the owners to be rated instead of the occupiers, and on that being done "the overseers (sub-sect. 1) shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate." Then "if the owner (sub-sect. 2) of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated." Then "the vestry (sub-sect. 3) may by resolution rescind any such order." Then sect. 7 provides that "every payment of a rate by the occupier, notwithstanding the amount thereof may be deducted from his rent as herein provided" (that refers to another provision), "and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon

the payment of the poor-rate." Therefore, by sect. 147 of the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), payment of a borough-rate by the owner will also be deemed payment by the occupier for the purpose of any qualification or franchise which as regards rating depends upon payment of the borough rate. Sect. 19 of the *Poor-rate Assessment and Collection Act*, 1869, also provides that "the overseers in making out the poor-rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid." . . . .

By another statute, the *Assessed Rates Act*, 1879 (42 Vict. c. 10), there are provisions to the same effect. Sect. 1 enacts that that Act "shall be construed as one with the *Poor-rate Assessment and Collection Act*, 1869;" and sect. 2 provides that "where by way of commission or abatement or deduction under the principal Act, or purporting or assumed to be under the principal Act, an allowance or deduction has, before the passing of this Act, been or shall hereafter be actually made, the same shall, for the purpose of every qualification or franchise depending upon rating or upon payment of rates, be deemed to have been duly made in pursuance of every or any agreement, order, notice, or proceeding necessary for the validity thereof under the principal Act, and to have been and to be an allowance or deduction which the overseers were and are empowered to make from the rate under the principal Act; and no qualification or franchise depending upon rating or upon payment of rates shall be defeated by reason of such allowance or deduction not having been made, in pursuance of an agreement in writing, order in writing, ... or by reason of any informality or defect in the making thereof; provided always, that this Act shall not relieve any overseers from any liability which they have incurred or may incur by making an allowance or deduction otherwise than in pursuance of the provisions of the principal Act." . . . .

These provisions demand careful consideration. The Act of 1869 (32 & 33 Vict. c. 41) provides in the first place for the more

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ready collection of the poor-rates, but the Legislature has at the same time been careful to provide that, for the purpose of any qualification or franchise which, as regards rating, depends upon payment of the poor-rate, the occupier, who would otherwise be liable to pay the rate, shall not be deprived of his qualification or franchise.

Upon what does that depend? It could not be that the Legislature meant in any way to introduce a false qualification. It could not have meant that persons who were unqualified in substance should be qualified by reason of payment by some other person. To my mind it seems clear that these sections are rested upon a recognition by the Legislature of what is undoubtedly the fact, that however the rates may be paid in form, in substance they are always paid by the occupiers, and that the provisions of the Legislature amount to this: that whereas in substance the rates are paid by the occupiers they shall also in form be deemed to be paid by them, although the payments are made by the hands of the owners. In other words, the effect of the legislation is that no occupier shall be deprived of his qualification by reason of a vestry availing itself of the facilities conferred by sect. 4 of the Act of 1869, which has provided that for the purpose of any qualification or franchise depending upon the payments of the rates, payments which in substance fall on the occupiers, shall, although actually made by the owners, constitute payments by them.

Before I part with sect. 2 of the Act of 1879 there is one question which I ought to notice, viz., whether the right to vote in this case is a qualification or franchise, which, as regards rating, depends upon the payment of the poor rate. The qualification for voting on the adoption of the *Public Libraries Act* is that the voter would have to pay the Public Libraries Assessment rate "in the event of the Act being adopted." It is a hypothetical and not an actual payment of rates, but I bear in mind the remark by Mr. Justice *Mellor* in the case of *Smith* v. *Seghill* (1), in reference to sect. 19 of the Act of 1869, at p. 429: "I think, the words used in sect. 19 being general and large, and the object being an enfranchising object, we ought to construe them, so far

(1) Law Rep. 10 Q. B. 422.

as we can, in a liberal spirit." I consider, therefore, that these sections to which I have referred are enfranchising, and ought, as far as possible, to be considered in a liberal spirit. To my mind it would be a narrow construction to say that a hypothetical payment was not to have all the incidents of an actual payment.

The question then is, what is the meaning to be attributed to the Legislature in sect. 3 of the *Public Libraries Amendment Act*, 1877, when it enacted that "'ratepayer' shall mean every inhabitant who would have to pay the free library assessment in the event of the Act being adopted." Two alternative interpretations of these words, "who would have to pay," have been submitted for the consideration of the Court. For the Plaintiffs it was contended that they mean those who would be legally liable to pay, and for the Defendants it was contended that they mean those who would have to pay, regard being had to the statutory provisions as to the mode and effect of payment. In my judgment the words fairly admit of the latter meaning, and that being so, I think that that construction ought to be put upon them. In the first place the clause is expressed in popular and not technical language. It does not speak of persons who are legally liable to pay, but of persons who would have to pay. In the next place, if, as I am bound to assume, the choice of this particular language in this clause of the Act of 1877 was deliberate, I cannot see that the Legislature could have any other object than to provide that the determination of the question whether the Acts should be adopted or not should rest with those upon whom the payment of the rates really falls; and the construction which appears to me ought to prevail will give full effect to that. It will also give effect to the policy of the Legislature as disclosed by sect. 7 of the *Poor-rate Assessment and Collection Act*, 1869, and sect. 2 of the *Assessed Rates Act*, 1879. Lastly, I think that the view which I take gives a substantial meaning and effect to the word "inhabitant" which is used in sect. 3 of the *Public Libraries Amendment Act*, 1877. The owner of land is not necessarily or always an inhabitant of the district in which the land is situate, and it is only in exceptional cases that the occupier is not an inhabitant of the district, and as the persons to whom voting papers were given were inhabitants, it

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seems to me that the construction which I now put on these words better accords with the intention of the Legislature.

For these reasons, I hold that the effect of sect. 7 of the *Poor-rate Assessment and Collection Act*, 1869, was to provide that "for the purpose of any qualification or franchise" the payments of rates made by the hands of the owners are in terms as they are in substance payments by the occupiers, and therefore I think the votes have been properly taken, and that this motion must be refused.

Solicitors: *Kearsey, Hawes, & Walsh*, agents for *Sydney George Edridge, Croydon; Edmund Dean*, agent for *Town Clerk of Croydon.*

T. F. M.

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ROSS *v.* BUXTON.

[1887 R. 1439.]

Solicitor—Lien—"Property recovered and preserved"—Action—Compromise—Payment of Money—Notice of Lien—Payment after notice.

The lien of the solicitor of a Plaintiff for the costs of an action attaches to money received by the Plaintiff by way of compromise where such money is in substance the fruit of the action.

Where a valid compromise of an action has been entered into under which a sum of money, the fruit of the action, is coming to the Plaintiff, the Defendant or his solicitor is not at liberty after express notice by the Plaintiff's solicitor of his claim to a lien for his costs, to pay that sum over to the Plaintiff in disregard of such notice.

The Defendant to an action paid £50 into Court in satisfaction of all damages to which the Plaintiff might be entitled. Before trial, by agreement entered into between the Defendant and his solicitors on the one hand, and the Plaintiff without his solicitor on the other, the action was compromised upon the terms that the Plaintiff should receive the £50 in Court in discharge of all claims, and that the Defendant should do everything necessary to enable the Plaintiff to get the £50 out of Court.

The Plaintiff then gave his solicitor notice that he intended to appear himself in person, and such solicitor gave to the Defendant's solicitors (but not to the Defendant) notice not to pay the Plaintiff any money until his (the solicitor's) costs in the action had been paid. After the receipt of this notice, the Defendant's solicitors obtained payment out to themselves of the £50, and paid it over to the Plaintiff.

Held, first, that the £50 paid under the pressure of, and in order to settle the action, must be treated as the fruit of the action.

Held, secondly, that the Defendant's solicitors having got out of Court

and handed over the £50 to the Plaintiff, after express notice of his solicitor's lien for costs, must themselves satisfy that lien, and

Held, thirdly, that the Plaintiff was liable, but that as the Defendant had neither received notice of the lien, nor authorized the payment to the Plaintiff, he was not liable to satisfy the lien.

MOTION.

This was a motion on behalf of Mr. *E. T. Ratcliff*, the trustee in bankruptcy of the estate of Mr. *E. J. Ward*, formerly a solicitor of the Court, for an order that it might be referred to the Taxing Master to tax *Ward's* bill of costs against the Plaintiff in this action, and to ascertain the balance due to *Ratcliff* as such trustee in respect of such costs, and the amount of the lien or charge of *Ward*, or *Ratcliff* in his right, for the same over the sum of £56 paid to the Plaintiff in compromise of the action, and that upon such balance being ascertained, the Plaintiff, the Defendant, and Messrs. *Clapham & Fitch*, the Defendant's solicitors, might pay to *Ratcliff* the sum of £56, or such less sum as should be sufficient to satisfy and discharge the lien; or, in the alternative, for an order that notwithstanding the compromise, the Plaintiff, the Defendant, and Messrs. *Clapham & Fitch*, might forthwith pay into Court the sum of £50 to the credit of the action, and that thereupon it might be referred to the Taxing Master to tax *Ward's* bill of costs, and to ascertain the balance due to *Ratcliff* in respect thereof; and that such balance when ascertained might be paid to *Ratcliff* out of the said sum of £50, so paid into Court so far as the same would extend.

The facts which gave rise to this application were as follows:—

On the 15th of July, 1887, the writ in this action was issued claiming specific performance of an agreement with reference to a house, damages for breach of the agreement, and an injunction.

On the 29th of July, 1887, the statement of claim was delivered.

On the 3rd of December, 1887, the Defendant put in a defence and counter-claim. The defence denied liability, and the counter-claim was for £75, being a quarter of a year's rent, and £600 damages for breaches of the agreement by the Plaintiff;

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and the Defendant paid into Court £50 in satisfaction of all damages, if any, to which the Plaintiff might be entitled.

On the 12th of January, 1888, on the motion of the Plaintiff, an *ex parte* injunction was granted, and on the 28th of January a reply was delivered.

On the 24th of February the *ex parte* injunction was dissolved, and an inquiry was directed as to the damages caused by the injunction, and the costs were ordered to be the Defendant's in any event.

On the 22nd of March, 1888, notice of trial was given; and on the 3rd of November, 1888, the Chief Clerk's certificate was made, finding £40 6*s.* 9*d.* damages payable by the Plaintiff to the Defendant.

At the time when the action was brought Mr. *Ward* was solicitor for the Plaintiff; but on the 25th of January, 1888, a change of solicitors was made, Messrs. *Boxall & Boxall* being the new solicitors for the Plaintiff. On the 18th of May, 1888, another change took place, and the firm of *Ward & Rees*, of which *Ward* was a member, became solicitors for the Plaintiff.

Towards the end of October and at the beginning of November, 1888, negotiations took place between the Defendant and his solicitors on the one hand, and the Plaintiff without solicitors on the other, and those negotiations resulted in an agreement, dated the 2nd of November, 1888, in the following terms:—"It is agreed that this action shall be settled on the following terms: Plaintiff to receive the £50 paid into Court, in full discharge of all claims by him. Defendant to do whatever may be necessary to enable the Plaintiff to obtain payment out of Court of the £50. Each party to pay his own costs of the action." That agreement was signed by Mr. *Ross* as Plaintiff in person, and by Messrs. *Clapham & Fitch*, the Defendant's solicitors.

It was not disputed that at the date of this agreement the Plaintiff was in an impecunious position, and that the compromise was a valid one.

On the day after the agreement was entered into the Plaintiff called at the offices of Messrs. *Clapham & Fitch*, and what then took place was thus stated by Mr. *Fitch* in his evidence: "The

Plaintiff called at my office on the 3rd of November, 1888, for the purpose of carrying out the terms which had been arranged between him and my partner. The mode of carrying out such terms was discussed, and I told the Plaintiff that he should go to his own solicitor and instruct him to carry out the terms. He absolutely declined to do so, and I thereupon told him that he should either appoint other solicitors to act for him in the action, or file a notice of appearance in person. He elected to adopt the latter course, and he thereupon signed a notice of intention to appear in person, which was subsequently served upon Mr. *E. J. Ward,* the firm of *Ward & Rees* appearing to have ceased to exist. I have sinced been informed that in the month of January last, the said *E. J. Ward* was struck off the roll of solicitors."

Mr. *Ward* in his evidence stated that on the 3rd of November, 1888, he received a notice of the change of solicitors, which he believed was in the handwriting of a clerk in the employ of Messrs. *Clapham & Fitch,* and was served by the clerk in their employ, who generally served him with poceedings on behalf of the Defendant.

On the 9th of November, 1888, Mr. *Ward* wrote to Messrs. *Clapham & Fitch* as follows:—"I have received a notice from Mr. *Ross* that he intends to act in person in this action. I shall be glad to know if you have arrived at a settlement with him in the matter, and I give you notice not to pay him any money until my costs in this action have been paid."

To that letter he received no reply, and then he wrote a letter to the Plaintiff in the action complaining of the notice and of the neglect to pay his costs. No notice was given by *Ward* to the Defendant.

On the 10th of November Messrs. *Clapham & Fitch* obtained payment to themselves out of Court of the £50, and on the 13th of November they paid it over to the Plaintiff. At the same time there was an additional sum of £6 paid, which was in consideration of certain payments which had been made by the Plaintiff in respect of the house which was the subject-matter of the action, and that sum of £6 together with the £50 made up the £56 mentioned in the notice of motion.

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C. Johnston Edwards, for Mr. *Ratcliff*:—

1. Notice was given by *Ward* to Messrs. *Clapham & Fitch*, before they paid over the money to *Ross*, not to pay him any money until *Ward's* costs in the action had been paid. 2. There was collusion between the Plaintiff and the Defendant's solicitors to deprive the Defendant's solicitor of his costs. On either of these grounds the applicant is entitled to the order he asks for.

[He referred to *Welsh* v. *Hole* (1), *Ormerod* v. *Tate* (2), *White* v. *Pearce* (3), *Ex parte Bryant* (4), *Slater* v. *Mayor of Sunderland* (5), *The Hope* (6), and Order XXII., rule 6, sub-sects. *a* and *b*.]

W. Pearson, Q.C., and *Beddall*, for the Defendant and Messrs. *Clapham & Fitch*:—

The Plaintiff did not accept the £50 paid into Court, so that Order XXII., rule 6, sub-sects. (*a*) and (*b*) do not apply. In this case there was nothing upon which the so-called lien ever attached. No judgment or verdict was ever obtained; so nothing was recovered or preserved by the exertions of the Plaintiff's solicitor, and where this is the case the Defendant may compromise with the Plaintiff without regard to the claims of the Plaintiff's solicitor, unless the solicitor can shew collusion, or in other words an intention both by the Plaintiff and Defendant fraudulently to deprive him of his inchoate lien. In all the cases cited on the other side there was either a verdict or a judgment, or something equivalent thereto. In *Welsh* v. *Hole* there was a verdict and a judgment for damages; in *Ormerod* v. *Tate*, an award; in *White* v. *Pearce*, a decree; in *Ex parte Bryant*, a judgment or order of the Lord Chancellor; in *Slater* v. *Mayor of Sunderland*, a verdict by the exertions of the solicitor. *The Hope* is a decision in our favour, and *Nelson* v. *Wilson* (7), *Ex parte Hart* (8), and *Quested* v. *Callis* (9), where there was no judgment, are also in our favour. In *Ex parte Morrison* (10) there was a verdict. Moreover, *Welsh* v. *Hole* was overruled by *Brunsdon* v. *Allard* (11), which was

(1) 1 Doug. 237.
(2) 1 East, 464.
(3) 7 Hare, 276.
(4) 1 Madd. 49.
(5) 33 L. J. (Q.B.) 37.
(6) 8 P. D. 144.
(7) 6 Bing. 568.
(8) 1 B. & Ad. 660.
(9) 10 M. & W. 18.
(10) Law Rep. 4 Q. B. 153.
(11) 2 E. & E. 19, 20.

approved in *The Hope* (1). Wherever anything has been recovered or preserved by the exertions of the solicitor, and there is a fund *in medio*, then there is the lien; but this lien does not amount to an equitable assignment of the proceeds of the judgment. On the other hand, when the whole matter is uncertain no lien attaches to what the parties may agree to settle the dispute at. So that the result of a compromise like this is that the lien is lost unless it is saved by collusion, which does not exist in this case.

Haldinstein, for the Plaintiff *Ross*.

Edwards, in reply:—

If the result of the action is a compromise under which money is paid to the Plaintiff, that money is property recovered in the action: *Twynam* v. *Porter* (2); *Townsend* v. *Reade* (3).

1889. April 17. STIRLING, J. (after stating the facts of the case down to the agreement for a compromise entered into on the 2nd of November, 1888, continued):—

It is the common case of all parties that the Plaintiff was and is impecunious. There is no evidence before me that this compromise was entered into at all with the view of depriving the Plaintiff's solicitor of his costs; and, in fact, the Applicant does not complain of this compromise, but admits the validity of it. What he complains of is that which subsequently took place. [His Lordship then referred to the evidence as to the circumstances attending and subsequent to the execution of the agreement, and resumed:] The £6 does not appear to me to have been part of the money paid in compromise, but to have been a payment of a different character, and therefore distinguishable from the £50 which constitutes the balance. Upon these facts, I think the £50 was handed to the Plaintiff as the result of the action, and constituted the fruits of it. Now, the question is, what is the law with reference to this case? and first of all, does the solicitor's lien for his costs attach to money received by way of compromise? It has been repeatedly held that it does. Thus

(1) 8 P. D. 144. (2) Law Rep. 11 Eq. 181.
(3) 4 L. J. (N.S.) (Ch.) 233.

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in *Davies* v. *Lowndes* (1), there was a writ of right, which came on for trial at bar on the 17th of December, 1846, when, by consent of counsel for the respective parties a verdict was taken, and judgment thereupon entered up for the tenant, the tenant by the like consent entering into a rule for payment to Mr. *Cook*, the demandant's then attorney on the record, of the sum of £5000 within a month. A rule had been obtained on behalf of *Henry Clarke*, one of the former attorneys in the action, calling upon the demandant and the tenant respectively to shew cause why it should not be referred to one of the Masters to ascertain the amount of the lien, if any, of *Clarke* upon the sum of £5000 agreed by the rule of Court of the 17th of December, 1846, to be paid by the tenant to *Cook*, the demandant's then attorney, for the compromise of the action, and why the tenant or his attorneys should not pay to *Clarke* the amount of such lien when so ascertained. Upon cause being shewn, the Court made the rule absolute, and ordered that such a sum should be paid into Court to abide the taxation of *Clarke's* bill as should be sufficient to pay him. Lord Chief Justice *Wilde* said: "We feel no doubt that *Clarke's* lien attaches upon the fund in question, and we think it is not extinguished by the taking of securities that have turned out to be worthless." Again, in the case of *Slater* v. *Mayor of Sunderland* (2), this had happened. At the trial of the action a verdict was taken for the plaintiff for £100, subject to a point reserved. Then negotiations were entered into, and it was agreed between the defendants and the plaintiff by their respective attorneys that the action should be compromised, the point reserved given up, and that the £100 should be taken for debts and costs. Then the plaintiff having equitably assigned the £100 to another person, the plaintiff's solicitor gave notice to the defendants' solicitor of his lien, and required the £100 to be paid to him. The defendants thereupon refrained from paying the money to any one, but were ready and willing to pay the money as the Court should order; and Mr. Justice *Crompton*, in giving judgment, says: "The rule is, I think, that the Court will not interfere to set aside any arrangement that has been come to between the plaintiff and the defendant, in favour of the

(1) 3 C. B. 808, 829. (2) 33 L. J. (Q.B.) 37.

attorney, except where there has been fraud or collusion between the parties. That is decided in *Brunsdon* v. *Allard* (1)." Then he goes on to say, "*Ormerod* v. *Tate* (2) goes to the length that after the defendant has had notice of the plaintiff's attorney's lien, the Court will make him pay the money over again. I certainly could not go contrary to that case without great consideration. But here there is no attempt to interfere with any arrangement between the plaintiff and the defendants. I cannot refrain from acting upon the doctrine that where no attempt is made to interfere with a compromise arranged between the plaintiff and the defendant, the Court may lay hold of the fruits of the judgment for the benefit of the attorney." Then he refers to *Davies* v. *Lowndes* (3), and points out the distinction between that case and the cases which fall under *Brunsdon* v. *Allard*.

In both the cases to which I have referred, the fund was still *in medio* when the order was made, but the cases appear to me to go further than that.

I will next refer to the case of *White* v. *Pearce* (4). That was a suit for foreclosure, and at the hearing an order was made for payment by the defendant to the plaintiff of principal, interest, and costs within six months after the Master's report, and by consent, in default of such payment, that the mortgaged estate should be sold with the approbation of the Master, and the purchase-money paid into Court. Default was made, and the particulars and conditions of sale were carried in and approved by the Master, and the sale appointed and advertised to take place on the 2nd of June, 1849. The solicitor of the plaintiff, having reason to suppose that an intention to compromise the suit was entertained by the plaintiff and defendant, gave notice to the defendant, and also to his solicitors, of his claim as solicitor for the plaintiff in the cause for the costs of the suit. The plaintiff and the solicitors of the defendant, acting on behalf of the latter, afterwards agreed to settle the mortgage debt and the suit for the sum of £300 to be paid by the defendant to the plaintiff, £200 of which was then paid, and £100 retained in

(1) 2 E. & E. 19.
(2) 1 East, 464.
(3) 3 C. B. 808.
(4) 7 Hare, 276.

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the hands of the defendant's solicitors, and the sale was countermanded. The solicitor for the plaintiff by petition prayed that the plaintiff or the defendant might be ordered to pay the petitioner his costs out of any moneys paid, or to be paid, to the plaintiff in respect of the debt and costs, the subject of the suit; and if it should appear that the defendant's solicitors had received from, or on behalf of, the defendant any moneys in respect of the amount of the debt and costs for the purpose of settling the plaintiff's claim, that the defendant's solicitors might be ordered to pay the petitioner his costs thereout, so far as such moneys would extend. The Vice-Chancellor says this (1): "The petitioner has undoubtedly a lien for his costs upon whatever has been received or paid for compromising the suit. The Court does not, however, allow the lien to stand in the way of an amicable arrangement. There is nothing improper in the compromise; but, if the defendant, not being under any pressure, except that which was the consequence of the decree, pays the debt of the plaintiff, with notice of his solicitor's lien, the question then is, whether the payment is or not made by the defendant in his own wrong. In *Welsh* v. *Hole* (2), Lord *Mansfield* puts the case of the assignment of a *chose in action*, which in legal strictness is not effectual, but still he says, as against the right of the assignee, the debtor, after notice, could not in equity discharge himself by a payment to the principal. The present is certainly not a weaker case. The defendant was asked to pay the money to the petitioner, and notice was given to him of the petitioner's lien for the costs of the suit. The estate would have been sold, and the money paid into Court, if it had not been for this agreement between the plaintiff and the defendant. The agreement come to appears to be a very proper one, and I have no doubt that it was made *bonâ fide*; but I think the defendant, in the circumstances of the case, has paid the money in his own wrong, and that the petitioner has a right to proceed either against the plaintiff or defendant."

Now, that is a very strong case, and it decides two things—first, that where money is received or paid as a compromise of a suit, and that money is in truth and in substance the fruit of the

(1) 7 Hare, 278. (2) 1 Doug. 237.

action, the solicitor's lien for costs extends to it; and further upon the authority of the case of *Welsh* v. *Hole* (1) before Lord *Mansfield*, that if a valid compromise is made, and after the compromise has been made the solicitor gives notice that he has a lien for costs, it will be at the defendant's own peril if in the face of that notice he pays over the money which has been agreed to be paid to the plaintiff by way of compromise. Now, the authority cited by the Vice-Chancellor in that case is *Welsh* v. *Hole*; but that is not the only case which exists on the subject. Another and very remarkable case is that of *Read* v. *Dupper* (2). There the principal cause of action, which was for business done by the plaintiff for the defendant, was agreed to be referred to the Master, who awarded a certain sum to be paid to the plaintiff, together with costs. The plaintiff afterwards threatened to take the defendant in execution unless the money due to him was immediately paid; whereupon the defendant's attorney, after a notice from the plaintiff's attornies not to pay it to the plaintiff himself, because their bill was not satisfied, paid the whole sum to the plaintiff himself. In consequence of this the plaintiff's attornies obtained a rule calling on the defendant's attorney to shew cause why it should not be referred to the Master to see what lien the plaintiff's attornies had upon the debt and costs recovered in this action as against the plaintiff himself, and why the defendant's attorney should not pay over that sum to the plaintiff's attornies. Lord *Kenyon* says this: "The principle by which this application is to be decided was settled long ago, namely that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained. If indeed the money had been paid over *bonâ fide* to the plaintiff before notice from his attorney of his lien, such payment would have been good; but here the payment was made in violation of the notice, which cannot be suffered." And then he refers to the same case which the Vice-Chancellor cited of *Welsh* v. *Hole* before Lord *Mansfield*. The rule, which was for payment *by the defendants' attorney*, was made absolute.

(1) 1 Doug. 237. (2) 6 T. R. 361.

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Again, in the case of *Ormerod* v. *Tate* (1), the cause being at issue at the *York* Spring Assizes, 1800, the parties entered into bonds to refer it to arbitration, and the arbitrator awarded the defendant to pay the plaintiff £26 by two instalments—£10 on the 24th of May, 1800, and the remaining £16 on a certain future day. On the 16th of May the plaintiff's attorney, having been informed that the parties intended to settle the matter between themselves for the purpose of ousting him of his lien on the costs, served the defendant with notice to pay the amount of the damages and costs to him, and not to settle the same with the plaintiff or any other person, as he had a lien upon the costs for his fees, &c.; notwithstanding which the defendant on demand of the first instalment by the plaintiff's attorney when it became due, refused to pay it to him, but paid it over to the plaintiff himself. Thereupon a rule was applied for and obtained, and Lord *Kenyon* said: "The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the Court in the ordinary course of the cause. The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant to cheat the attorney of his lien."

Now it was said that those cases had been overruled or questioned; but I cannot find any ground for coming to that conclusion. Certainly none of the cases to which I have referred are inconsistent with those two which were chiefly relied upon by the Respondents upon this application, namely, *Ex parte Morrison* (2), and *The Hope* (3). In fact the cases divide themselves into two classes. In the last case of *The Hope*, Lord Justice *Lindley* referred to a passage in *Chitty's Archbold's Practice* as correctly stating the law upon the subject. I will refer to that first. It is there stated (4), that the solicitor's lien is merely in truth a claim for the equitable interference of the Court on behalf of

(1) 1 East, 464.
(2) Law Rep. 4 Q. B. 153.
(3) 8 P. D. 144.
(4) 14th Ed. (1885) p. 164.

the solicitor; and then follows this passage: "The Court will exercise this equitable interference where the solicitor has given the opposite party, or his solicitor, notice of his lien, and that he claims the amount payable to his client, to be paid to him in the first instance; in which case the opposite party will, at his peril, pay the client or release the claim, or compromise it without the assent of the solicitor." In support of that proposition, the cases to which I have referred are cited, and they appear to me to bear out the principle which is laid down in the text-book. That is the first class of cases.

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Then with regard to the other class of cases he says: "So the Court will exercise it, though no such notice"—that is, of his lien—"has been given, in cases where it is clearly made out that there is some collusion or fraudulent conspiracy between the parties to cheat the solicitor of his costs. But, unless such notice has been given, or there has been such collusion or fraudulent conspiracy, the client, although he sues *in formâ pauperis*, may compromise with the other party, and give him a release, without the intervention of his solicitor; and the solicitor in such a case can afterwards look to his client only for payment, and cannot proceed in the action." There is one sentence more which I ought to read, because it seems at first sight to point in the Respondents' favour. "Even after such notice, the parties may, it seems, compromise before verdict or judgment without regard to the solicitor's claim for costs." But that is not to be understood, I think, as in any manner inconsistent with the prior part of the paragraph. It means, as I read it, simply this—and that is the law as I take it—that a *bonâ fide* compromise entered into before verdict or judgment, and even after notice of the solicitor's claim for costs, is good, and will not be set aside or affected at the instance of the solicitor unless collusion or fraudulent conspiracy exists between the parties.

The cases of *Ex parte Morrison* (1) and *The Hope* (2), are authorities that the compromise of the 2nd of November is valid, and they would also be authorities that if the money had been paid over on the 3rd of November before *Ward* gave notice of his claim the Court could not interfere. But they do not seem to me to

(1) Law Rep. 4 Q. B. 153. (2) 8 P. D. 144.

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conflict with this proposition, that where a valid compromise has been entered into under which a sum of money, the fruit of the action, is coming to the plaintiff, the defendant or his solicitor is not at liberty, after express notice by the plaintiff's solicitor of his claim to a lien, to pay that sum over to the plaintiff in disregard of the notice.

Then, that being the law, how do the facts stand here? In the first place, is the sum of £50, which is the subject-matter of the agreement of the 2nd of November, to be treated as the fruits of the action? It seems to me it must be. It was plainly paid under pressure of the action and in order to settle it. It was a fund which was paid into Court, and which in the ordinary course could not have been got out without notice to the Plaintiff's solicitor, had it not been for the notice which was given of the Plaintiff appearing in person. Then, secondly, was notice given of the Plaintiff's solicitor's claim for costs? It plainly was given to Messrs. *Clapham & Fitch.* They had distinct notice of it on the 9th of November, and after that they got the fund into their own hands and paid it over to the Plaintiff in disregard of the notice. Accordingly, I think, subject to one further remark, that an order against them ought to go. I do not, however upon the materials before me, see that the Defendant *Buxton* is liable. No notice is shewn to have been given to him, and the fund did not come into his hands; neither did he, as I think, authorize his own solicitors to receive payment of the money and hand it over to the Plaintiff. All that he agreed to do was to do what was necessary to enable the Plaintiff to obtain payment out of Court of the £50. That payment out of Court could not have been obtained without an order of the Court. But it was not necessary for the purpose of getting it out of Court that an application should be made either by the Defendant or his solicitor. It might have been made by the Plaintiff, and all the Defendant would have had to do would have been to consent. I do not see, therefore, that the money came into the hands of the Defendant, or that he had notice given to him, and therefore I think there should be no order made against him.

Only one remark remains to be made, and that is that the solicitors on the record were Messrs. *Ward & Rees*, and not *Ward*

alone. I have no explanation before me at the present moment as to how Mr. *Rees* ceased to have an interest in the fund; that defect must be supplied, or else Mr. *Rees* must in some way be made a party to the application.

The Plaintiff who has received the fund is liable as well as Messrs. *Clapham & Fitch.*

Edwards undertook to produce evidence that *Rees* had handed over his interest in the fund to *Ward.*

Solicitors: *E. T. Ratcliff; Clapham & Fitch; J. E. Coxwell.*

W. W. K.

DOERING *v.* DOERING.

STIRLING, J.
1889
May 14, 15.

[1875 D. 32ª.]

Defaulting Trustee of Will—Interest under Will acquired by Trustee—Assignee from Trustee—Making good Default—Beneficial Derivative Interest.

The rule that a defaulting trustee cannot claim, as against his *cestuis que trust*, any beneficial interest in the trust estate until he has made good his default, and that his assignee is in no better position, even where the default has been committed after the assignment, applies not only to shares taken by the trustee under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate.

Mrs. *D.*, an executor and trustee entitled under a will to a life interest in a trust fund, took assignments from two of the beneficiaries of their reversionary shares in the fund, and mortgaged the two shares so acquired to *F.* Mrs. *D.* was afterwards found a defaulter, and died insolvent:—

Held, that *F.* took subject to all the equities against his mortgagor, and that the beneficiaries under the will were entitled to have the default of Mrs. *D.* made good out of the shares in the estate which had been acquired by her in priority to the claims of her mortgagee.

ADJOURNED SUMMONS.

Mr. *J. A. E. Doering*, by his will, dated the 25th of May, 1865, amongst other things, devised and bequeathed all his real and personal estate to his wife, Mrs. *Doering*, and his son, Mr. *Edward Doering*, upon trust to pay the income thereof to his wife during life or widowhood, and subject thereto to hold the trust premises upon certain trusts for the benefit of his children and their issue *per stirpes.* And he thereby appointed Mrs. *Doering* and *Edward Doering* his executors.

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The testator died on the 6th of October, 1866, and his will with two codicils (dated respectively the 25th of May, 1865, and the 24th of May, 1866) were proved by Mrs. *Doering* alone.

He had nine children, of whom eight survived him, and the ninth was dead, leaving issue living at the testator's decease; and under the trusts of his will, subject to his wife's life interest, the trust estate became divisible in ninths.

Edward Doering did not prove, and never accepted or acted in the trusts of the will; and *Frederick Bernard Doering*, another of the testator's sons, acted as trustee from the testator's death until the year 1871.

In 1872 *J. J. L. Labouchere* was appointed a trustee of the will jointly with Mrs. *Doering*.

By indenture dated the 21st of July, 1869, *Arthur May Doering*, another of the testator's sons, assigned his share in his father's will to his mother, Mrs. *Doering*, by way of mortgage to secure £300 and interest.

By indenture dated the 12th of February, 1870, he assigned his share (subject to the last-mentioned mortgage) to Mrs. *Doering* and his brother, *Frederick Bernard Doering*, by way of mortgage to secure £250 and interest; and this mortgage was, after *Labouchere's* appointment as trustee, transferred to Mrs. *Doering* and *Labouchere* as trustees of the will.

By indenture dated the 12th of September, 1870, he assigned his share (subject to the two former mortgages) to *James Virtue* by way of mortgage to secure £250 and interest.

By indenture dated the 11th of August, 1871, *Arthur May Doering* assigned his shares to Mrs. *Doering* absolutely, subject to the three above-mentioned mortgages.

By indenture dated the 19th of December, 1872, *Frederick Bernard Doering* assigned his share under his father's will to Mrs. *Doering* by way of mortgage to secure £2500 and interest.

In December, 1875, an action for the administration of the estate of the testator was brought by two of the persons beneficially interested under his will against Mrs. *Doering*, Mr. *Labouchere*, and *Frederick Doering*, and judgment therein, directing the usual accounts and inquiries, was delivered on the 2nd of July, 1876.

By indenture dated the 21st of November, 1877, and made between Mrs. *Doering* of the one part, and one Colonel *Fyler* of the other part, after reciting that Mrs. *Doering* was entitled under the will of the testator to a life interest in the residue of his estate (which was being administered by the Court), and also reciting that she was also entitled absolutely to two ninth parts or shares of such residue, meaning thereby the parts or shares of *Frederick* and *Arthur Doering* (which recital was incorrect as to the part or share of *Frederick Doering*), Mrs. *Doering* assigned all her interest in the residuary estate of the testator to Colonel *Fyler*, by way of mortgage for securing £900.

On the 12th of December, 1879, the Chief Clerk made his certificate in the administration action, and he thereby found that the sum of £3141 14*s.* 9*d.* was due from Mrs. *Doering*, as executrix and trustee of the will.

It appeared that after the accounts had been taken, but before the date of the certificate, Mrs. *Doering* received on account of the testator's estate further sums amounting to £780. She died insolvent on the 27th of June, 1883, having made a will by which she appointed *Frederick Doering* her executor, and after her death the administration action was continued against *Frederick Doering* in his additional capacity of such executor.

The estate of Mrs. *Doering* being thus indebted to the estate of the testator in the above-mentioned sums of £3141 14*s.* 9*d.* and £780, making together £3921 14*s.* 9*d.*, the Plaintiffs in the administration action took out this summons in order (amongst other things) to have it determined by the Court whether or not the beneficiaries under the will of the testator were entitled to have the default of Mrs. *Doering*, as executrix and trustee of the will, made good, out of any share or interest to which she was derivatively entitled thereunder, in priority to the sum of £900 and interest due to Colonel *Fyler* on his mortgage of the 21st of November, 1877.

This summons was now adjourned into Court.

W. Pearson, Q.C., and *Warrington*, in support of the summons:—

Mrs. *Doering* is an executrix and trustee in default, and she is

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also derivatively entitled, as mortgagee and assignee, to certain shares under her testator's will. Colonel *Fyler*, as the assignee of an equitable *chose in action*, takes it subject to all the equities to which his assignor is subject. It is clearly settled that the estate of a testator is entitled to a lien upon any beneficial interest to which a defaulting executor or trustee is entitled under the will, in priority to any assignee of such executor or trustee: *Barnett* v. *Sheffield* (1); *Cole* v. *Muddle* (2). The executor or trustee "must be treated as having by anticipation received or retained payment of his share," and this equity is good against his assignee: *Irby* v. *Irby* (3). Satisfaction must be made for the breach of trust, even though the assets were wasted subsequently to the assignment: *Morris* v. *Livie* (4); and this principle applies not only to beneficial interests taken by the executor or trustee directly under the will, but also to interests to which he may have become entitled derivatively, *e.g.*, as being one of the next of kin of a *cestui que trust* who has died intestate: *Jacubs* v. *Rylance* (5).

Swinfen Eady, for other parties in the same interest:—

Colonel *Fyler* took his assignment subject to the risk run by all assignees of a *chose in action*. As was said by *Hall*, V.-C., in *Hooper* v. *Smart* (6), with reference to purchasers and transferees of *choses in action*: "Such purchasers and transferees are always exposed to great risk. They have been held to take subject to making good a breach of trust by a trustee, the vendor, although the breach of trust was subsequent to the purchase."

Hastings, Q.C., and *Dauney*, for Colonel *Fyler*:—

The shares in the testator's estate to which Mrs. *Doering's* estate is entitled are shares which she took as purchaser or mortgagee from certain of the beneficiaries; and although the rule that neither a defaulting executor or trustee, nor his assign, can take anything from the estate of his testator until the executor or trustee has made good his default out of any beneficial interest coming to him under the will, no doubt applies to beneficial

(1) 1 D. M. & G. 371.
(2) 10 Hare, 186.
(3) 25 Beav. 632, 638.
(4) 1 Y. & C. (Ch.) 380.
(5) Law Rep. 17 Eq. 341.
(6) 1 Ch. D. 90, 98.

interests taken directly from the testator under his will, it does not apply to a case like the present, where the executor or trustee has a derivative share or interest only; *e.g.*, it does not apply to the case of a devisee who is indebted to the estate: *Ex parte Barff* (1).

[STIRLING, J.:—The case of *Fox* v. *Buckley* (2) shews that *Ex parte Barff* was so decided because the devisee there had the legal estate, and *Knight Bruce*, V.-C., held that he had no power to charge the estate with the debt.]

The only case in which the rule has been held to apply to a derivate interest is *Jacubs* v. *Rylance* (3), the head-note in which appears to go beyond the judgment, and which, being very shortly reported, can hardly be looked upon as a satisfactory authority for such a large extension of principle.

[They also cited *In re Knapman* (4).]

Buckley, Q.C., and *Beaumont*, for the trustees of the will.

Hornell, *Tremlett*, *F. H. Law*, and *H. L. Fraser*, for other persons interested.

Pearson, in reply.

STIRLING, J. (after stating the facts of the case, continued):—

It is well settled that if the shares in question had belonged absolutely to Mrs. *Doering* under the will, and she had mortgaged them to Colonel *Fyler*, and then she was found to be a defaulter, she could not have claimed any portion of the estate for herself while the default existed, and her assign could not stand in any better position. And the law has gone to this extent, that though the breach of trust is committed after the assignment, nevertheless, the rule applies, and the assignee or mortgagee is not entitled to any share in the estate until the default is made good. The theory on which that rule is based is that the Court treats the trustee as having received his share by anticipation, and the answer to any claim made by the trustee is this: "You

(1) De G. 613.
(2) 3 Ch. D. 508, 511.
(3) Law Rep. 17 Eq. 341.
(4) 18 Ch. D. 300.

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have already received your share; you have it in your own hands"; and his assignee is in no better position.

That is not precisely this case. The shares in question were not given to the widow by the will in the first instance, and it is said that the rule which I have mentioned does not apply to derivative shares. The authority which shews that the rule does so apply is *Jacubs* v. *Rylance* (1). That is an extremely strong case. In that case a testatrix appointed her husband executor, and bequeathed certain property upon trust for her children. One of the children died intestate, leaving the father (the executor) the sole next of kin, and a sum of £112 had been carried over to the separate account of the deceased child. The father had become insolvent and was indebted to the estate in a larger amount, and the surviving children applied for payment of the £112. The father was the legal personal representative of the deceased child, but he did not appear. It is clear, however, that the contest must have been directed to the question who was entitled to the beneficial interest, because the persons who appeared to oppose the application were the father's assignee in insolvency, and a mortgagee from the father.

What Sir *George Jessel* says is this: "In the view of this Court the trustee, who is indebted to the estate in a sum largely exceeding this fund, must be taken to have paid himself all that he can claim out of the moneys which have come to his hands, and for which he has not accounted. This is not a case of impounding a trust fund. The trustee has already had all that he can claim, and has paid himself; therefore the money standing to this account must be paid to the other children." In other words, he lays down this, that the principle which I have stated with reference to interests which belonged to trustees in the first instance applies also to derivative interests. That being the principle, I think it would be wrong to fritter it away, and I therefore hold that Colonel *Fyler* can stand in no better position than his mortgagor, and that he must take the shares subject to all the equities attaching to them.

Solicitors: *Oehme, Summerhays, & Co.; Eardley Holt & Hulbert; Vandercom & Co.; Freshfields & Williams.*

(1) Law Rep. 17 Eq. 341, 342.

W. W. K.

In re CAWLEY & Co.

C. A.
1889
CHITTY, J.
March 8, 27.
C. A.
June 1, 3.

Company—Director—Shareholder—Shares—Transfer — Registration — Powers of Directors—Fiduciary Relation—Discretion to refuse Registration—Rectification of Register—Indebtedness of Transferor, when to be ascertained—Call—Resolution—Date of Call omitted—Date fixed by subsequent Resolution—Relation back — Minutes, Alteration of—Agenda Paper—Order of Business—Companies Act, 1862, *ss.* 22, 35 [*Revised Ed. Statutes, vol. xiv., pp.* 207, 210].

Under s. 22 of the *Companies Act*, 1862, the right to transfer his shares is incident to every shareholder; and, therefore, a director-shareholder has as much right as any ordinary shareholder to transfer his shares and to have his transfer registered, unless he falls within a provision in the company's articles of association enabling the directors to refuse registration where the shareholder seeking to transfer is "indebted to the company in respect of calls or otherwise;" and the Court will, on an application by the director-shareholder under s. 35 of the *Companies Act*, 1862, exercise its power of compelling registration provided there is no equity against him as director, such as having been party to a postponement of a call to enable him to get rid of his shares and so evade liability.

Where the articles of association of a limited company give the directors a discretion to refuse to register a transfer of shares by a shareholder if he is indebted to the company, the time at which it is to be ascertained whether he is indebted or not is when the transfer is sent to the proper officer of the company for registration, and not when it subsequently comes before a board-meeting for registration. Thus, where *H.*, a shareholder, who was also a director, executed a transfer of his shares for value, and thereupon the transferee sent it in to the secretary of the company for registration as required by the articles of association, and shortly afterwards the transfer was submitted by the secretary to the directors at a board-meeting for registration, but the board declined to register it, and passed a resolution for a call:—

Held, on an application by *H.* against the company, under s. 35 of the *Companies Act*, 1862, to compel the registration, that under the company's articles of association the directors had a discretion to refuse registration only where the shareholder seeking to transfer was "indebted to the company in respect of calls or otherwise;" and that, as *H.* was not so indebted at the time his transfer was sent in to the secretary, they were bound to register, even though he was a director and was aware when he executed the transfer that a call was imminent.

A resolution for a call, to be valid, must state not only the amount of the call, but also the time at which it is to be paid. Thus, where the directors of a company passed a resolution for a call, and the resolution fixed the sum per share to be called up, but left the date at which it was to be paid in blank, and some time afterwards a resolution was passed

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fixing the date for payment, and notices of the call were sent to the shareholders:—

Held, that there was no proper call made until the second resolution fixing the date of payment, and that the second resolution did not, in point of date, relate back to the first.

The agenda-paper of a directors' board-meeting contained, as the first business, the consideration of a transfer of shares sent to the secretary for registration; and then, as the next business, the consideration of the question whether a call should be made to meet the company's liabilities:—

Held, by *Chitty*, J., that the directors were entitled to take their business at the meeting in any order they thought proper, and, in the exercise of their fiduciary power of making a call (*Gilbert's Case* (1)), to pass a resolution for a call as their first business so as to prevent the intending transferors from evading their liability by prior registration.

Order of *Chitty*, J., refusing an application under s. 35 of the *Companies Act*, 1862, for registration of a transfer of shares, reversed.

APPEAL from Mr. Justice *Chitty*.

On the 16th of April, 1886, *Cawley & Co., Limited*, a company formed for the purpose of taking over certain fuller's-earth works at Nutfield, Surrey, was registered with a nominal capital of £60,000 in shares of £1 each, which the memorandum authorized to be divided into classes.

The articles of association contained the following provisions:—

(Art. 23.) That the company should have a first lien upon all the shares of any member, "for all moneys owing to the company from him, alone or jointly with any other person, whether due or not."

(Art. 24.) That such lien might be made available by a sale of such shares, provided that no such sale should be made except under a resolution of the board, and until notice in writing should have been given to the indebted member or other holder of the shares.

(Art. 26.) That transfers of shares "shall not be complete until the same shall have been duly entered in the register of transfers."

(Art. 27.) "No person being indebted to the company, either in respect of calls or otherwise, shall, without the consent of the board—which consent they may give or withhold at their

(1) Law Rep. 5 Ch. 559.

discretion—become or be registered as a member in respect of any share the amount of which shall not have been fully paid up, or transfer any share."

(Art. 28.) That the register of transfers should be kept by the secretary under the control of the board.

(Art. 32.) "A person shall not be registered as the transferee of a share until the instrument of transfer, duly executed and stamped, has been left with the secretary to be kept with the records of the company, but to be produced at every reasonable request; but in any case in which, in the judgment of the board, this article ought not to be insisted on, it may be dispensed with."

(Art. 38.) "The amount payable on the shares in the capital shall be payable at the bankers of the company, or at such other place as the board shall appoint, with such deposit and in such instalments and manner, and at such time, as shall be appointed from time to time by the board."

(Art. 42.) "All calls in respect of shares shall be deemed to be made at the time when the resolutions authorizing them are passed by the board."

(Art. 44.) "The board may, by any subsequent resolution, appoint a new time and place for payment of a call as regards such persons as have not paid the same."

(Art. 45.) "Whenever any call in respect of shares is made otherwise than on allotment, twenty-one days' notice of the time and place originally, or by any subsequent resolution, appointed for the payment thereof, shall, either at the time or any time after the call is made, be given to every member liable to the payment thereof."

(Art. 46.) That in case of non-payment within seven days after the appointed day, a second notice should be given requiring immediate payment, and in case of non-payment for seven days after such second notice, the company might (without prejudice to their rights to forfeit the shares) sue the defaulter for the amount unpaid, with interest.

(Art. 51.) That if any instalment on a share remained unpaid for seven days after such notice, the board might declare the share forfeited.

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(Art. 90.) That the procedure at a board should be regulated as the directors present thought fit.

The issue of the company's share capital was divided into ordinary shares of £1 each and deferred shares of £1 each. On the ordinary shares 5*s.* per share had been paid up, and on the deferred shares 10*s.* per share. No dividend had yet been paid on the deferred shares.

In July, 1888, *William Brown Hallett*, who was the registered holder of 2300 deferred shares, became a director of the company.

On the 15th of December, 1888, *Hallett* executed a transfer of 2000 of his shares, on which no further call had then been made, to *Solomon Jones*, who was a clerk to his, *Hallett's*, solicitors, in consideration of £80. *Hallett* deposed that this was the full value of the shares, that the transfer was by way of absolute sale, and that he himself retained no interest whatever in the shares. The transfer was duly executed by *Jones* as well as by *Hallett*, and on or before the morning of the 18th of December, 1888, *Jones* sent or took it to the secretary of the company for registration.

Some time previously to *Hallett's* executing the transfer, *William Blewitt*, the chairman of the company, had discussed with him the financial position of the company and the necessity of making a call upon the shareholders in case the company's bankers, who had lent the company £16,000 for three months upon the security of the uncalled capital, refused to renew the loan. On the 17th of December, 1888, *Blewitt* received a letter from an insurance society, who had guaranteed the loan, stating that the bankers would renew the loan for a further three months on condition that the board on the following day ordered a call of the unpaid capital, but that this would be the last renewal. Accordingly, at an ordinary meeting of the directors, at which *Hallett* was present, held in the afternoon of the following day, the 18th of December, that letter was considered. The first business set down on the agenda paper was "To report and pass" various transfers, including that from *Hallett* to *Jones*, and then followed the matter of the bankers' loan; but at the meeting the question of the transfer was, in spite of *Hallett's* request that it should be taken as the first business, deferred until the question of making

a call had been considered, the majority of the directors present thinking it desirable that a matter of such urgent and vital importance to the company as the proposed call should be considered before any other question.

After a short discussion a resolution was passed—*Hallett* being the only dissentient—"That the remainder of the capital of the company be and is hereby called up, payable as follows: As to shares, numbered," &c., being the shares on which 5*s.* per share only had been paid, "the sum of 5*s.* per share payable on the ——; and as to the whole of the shares of the company"—except certain shares issued as fully paid up—"5*s.* per share payable on the ——, and 5*s.* per share payable on the ——." After this resolution had been passed, *Hallett* insisted at the meeting that, inasmuch as the transfers had been presented for registration before the calls were made, they should be at once registered, but a further resolution was carried refusing to sanction the registration on the ground that the transfers had been made in order to escape the calls, and that the directors might become personally liable to the company for any loss arising from the inability of the transferees to pay the calls. As to the reason for leaving the dates of the calls in blank in the resolution, *Blewitt* deposed that, as chairman, he did not think it necessary to insert the dates or to order immediate notice of the calls to be sent out, because he was still hoping that other financial arrangements might be made which would enable the company to pay off the bankers' loan, and so dispense with the necessity of enforcing the calls. *Hallett* deposed that although he had discussed the company's financial position with the chairman, he was not actually aware of the intention to propose the resolution for the call until the morning of the 18th of December, 1888, when the transfer was already in the secretary's hands for registration. Some time between that meeting and another meeting of the board, held three days afterwards, namely, on the 21st of December, the three blanks in the minutes of the resolution were filled in by the secretary by the insertion of the dates "15th February next," "15th March next," and "15th April next." It appeared that the secretary had received no instructions to alter the minutes, but that he inserted the dates of the calls in

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the exercise of his own discretion. At the board meeting of the 21st of December the minutes of the previous meeting, with the dates of the call thus inserted, were "read and confirmed." The directors, fortified by counsel's opinion, persisted in their refusal to register *Hallett's* or any other of the transfers; and at a meeting of the board, held on the 17th of January, 1889, a resolution was passed settling and adopting for immediate issue the form of a circular or notice of call. *Hallett* was present at that meeting, but took no part in the proceedings, and did not vote on the resolution.

The circular or notice so settled and adopted purported to be signed by the secretary of the company, and was dated the "22nd January, 1889." It commenced as follows: "Sir,—I beg to inform you that by a resolution of the board of directors of *Cawley & Co., Limited*, made and passed on the 18th day of December, 1888, it was resolved that the remainder of the capital of the company be called up, payable as follows:—As to the shares upon which only 5*s.* has been paid and numbered," &c., "the sum of 5*s.* per share, payable on or before the 15th day of February next, and as to the whole of the shares of the company (including those above-mentioned, but excepting those numbered," &c. "issued as fully paid),

5*s.* per share, payable on the 15th March next.
5*s.* do. do. do. 15th April next."

Then followed a statement of the sum due from the shareholder, and a request for payment at the office of the company's bankers. On the 17th of January, 1889, the same day as the directors' meeting of that date, but before the meeting actually took place, *Hallett* served the company with notice of motion under sect. 35 of the *Companies Act*, 1862, to have it declared that the company ought to have registered his transfer on the 18th of December, 1888, and for an order to rectify the company's register accordingly.

The call-notices were not actually sent out until the evening of the 6th of February, 1889, and on the following day *Hallett* received the notice addressed to him and requiring payment of two sums payable respectively on the "15th March" and "15th April," being calls of 5*s.* each on the whole of his 2300

shares. The motion was heard before Mr. Justice *Chitty* on the 8th and 27th of March, 1889.

Romer, Q.C., and *Maidlow*, in support of the motion :—

The directors had no right to direct in what order the business of the meeting should be taken. It was the duty of the directors to order the transfers to be registered the moment they went in to the secretary, and they were not justified in making the call before the transfers were registered.

Maclean, Q.C., and *C. B. McLaren*, for the company :—

The exigencies of the company required that a call should be made, and the directors were justified as between themselves and Mr. *Hallett* in making that call before they proceeded to the business of registering the transfers. The power of making a call vests in the directors, and it is a fiduciary power to be exercised for the benefit of the company: *Gilbert's Case* (1).

The resolution for the call was valid, notwithstanding no time was fixed in the resolution itself for the payment of the call: *Dawes' Case* (2); *Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock* (3).

Romer, in reply :—

Directly the deed of transfer was presented for registration it ought to have been registered: *Reg.* v. *Inns of Court Hotel Company* (4).

[He also referred to *Société Générale de Paris* v. *Walker* (5).]

March 27. CHITTY, J. :—

This is a motion by Mr. *Hallett*, a director of the company, for the rectification of the register by removing his name therefrom, as transferor of 2000 shares, upon which 10*s*. only had been paid, the shares being £1 shares, and substituting for his name the name of his transferee.

The facts are these: It was known to the board and to Mr. *Hal-*

(1) Law Rep. 5 Ch. 559.
(2) 38 L. J. (Ch.) 512.
(3) 7 M. & W. 574.
(4) 11 W. R. 806.
(5) 11 App. Cas. 20.

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lett, as one of the directors, that the bankers of the company were pressing for payment of a large sum of £16,000, and that loan was secured on calls to be made in respect of the company's shares. Mr. *Hallett* had been aware that that call was imminent, and executed a transfer of the shares in question in order to escape from the liability to pay the call. He sent in the transfer on the 18th of December, and on the same day there was a directors' meeting, at which he attended, and his transfer and other transfers for a considerable number of shares were reported to the board, and the board, in arranging the business to be transacted on that day, postponed the consideration of the registration of the transfers until they had proceeded to the other business. Then it appears from the minutes of the meeting held on that day that the refusal of the company's bankers to renew the loan of £16,000 unless the uncalled capital of the company was forthwith called up was considered, and a resolution was carried with but one dissentient, namely, Mr. *Hullett*, who voted against it: "That the remainder of capital be and is hereby called up payable as follows:" Then, without reading through the rest of the resolution, it appears that 15*s*. per share remained to be called upon some of the shares and 10*s*. on others; and the 15*s*. and the 10*s*. were, according to the resolution, called. The dates at which the calls were to be payable were not inserted in the resolution. Then the question of the registration of transfers came up, and the substance of what occurred was that the directors refused to register, and by that refusal, after having taken counsel's opinion, which is referred to in the resolution itself, the directors have stood firm.

Now, the first point is, had the directors the right to direct in what order their business should be taken; on that I cannot see any room for doubt. Mr. *Hallett*, one of the directors, had no right to dictate to the board in what order the business should be taken, and the board proceeded to do that which, in my opinion, it was their duty to do. In this case the exigencies of the company required that a call should be made, and, as appears by *Gilbert's Case* (1), the power of making a call vested in the directors is a fiduciary power to be exercised for the benefit of

(1) Law Rep. 5 Ch. 559.

the company, and if they could fairly and reasonably prevent the transfers by making the call first, I think they were justified in doing it.

The result is, therefore, that before the directors regulating the course of their business came to consider the question of the registration of the transfers a call had been made.

The question, then, is, whether on the true construction of the articles, and having regard to the general law on the subject, the directors were justified, as between themselves and Mr. *Hallett*, in making that call before they proceeded to direct the registration of his transfer.

Now, the 27th article runs thus: "No person being indebted to the company either in respect of calls or otherwise." I stay there to say that the term "indebted" is used in its ordinary meaning; it includes a debt though not payable at the time. Then the article proceeds: "shall, without the consent of the board—which consent they may give or withhold at their discretion—become or be registered as a member in respect of any share the amount of which shall not have been fully paid up or transfer any share."

Now, it is said it was the duty of the directors to order the transfer to be registered as upon the moment that it was sent into the secretary. I think that proposition cannot be sustained either having regard to the articles or to the general law on the subject. The registration of a transfer is not a mere ministerial act. The directors are entitled to see the transfer for themselves, and it is for them to look into the matters and come to the conclusion whether the transferor is or is not indebted to them. I am only dealing with the case of a transferor, but the article deals with the transferee also, and they have, according to the articles, the discretion to say that, notwithstanding the indebtedness either of the transferor or of the transferee, the registration of the transfer may take place.

Now, here there is no delay of any kind in holding the directors' meeting to consider the question of passing the transfer. As I have said, the transfer was sent in on the 18th, and it was on that same day that the directors' meeting took place. I think, therefore, that, according to the 27th article, it was right that

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the transfer should be submitted to the directors for their consideration, and that they were not bound, as I have already said, to order their business according to the pleasure of Mr. *Hallett*, and for the purpose of enabling him to escape from the call which he, in common with the other shareholders, had to bear, and that the real point of time according to this article is the time when the matter comes before the board in due course, there being no delay, for consideration. That, as I say, is my opinion on the article.

It is said there is authority against it. Lord *Blackburn*, however, in *Société Générale de Paris* v. *Walker* (1), speaking of the duties of directors, says: "They (the company) are entitled (it is not necessary to inquire whether they are bound) to delay for a reasonable time, and to make reasonable inquiries before registering; and it is, I believe, the general practice to delay the registration at least till there has been an opportunity given to the registered holder to answer a letter of advice telling him that a transfer has been lodged." Lord *Blackburn* is there pointing to the general practice which exists of giving notice of the transfer, the directors doing that with the view to protect themselves against forgery or fraud. I do not quote that proposition of Lord *Blackburn's* for saying that in this case there was any ground to question the signature of the transferor, but I do quote it for the purpose of shewing that the directors themselves are to exercise their judgment with regard to the transferee, taking the question of the execution by the transferor and by the transferee, and the question in a case like the present of the indebtedness of either party to them, and they have a reasonable time for doing that; certainly in this case there was no question of the reasonableness of the time elapsed.

In *Gilbert's Case* (2) there was no call made previously to the day at which the transfer was sent in. *Gilbert's Case* is a very remarkable case, and in some respects like this, because the transfer being sent in on the 18th of April, there had been a meeting of the directors on the 17th, at which no call was resolved upon. But the Court came to the conclusion that the directors, and Mr. *Gilbert* was one of them, whose case was in

(1) 11 App. Cas. 20, 41. (2) Law Rep. 5 Ch. 559.

question before the Court of Appeal, had postponed the making of the call for the purpose of allowing the transfers to go forward, and a transfer had actually been registered in that case. Still the transfer was set aside because the directors, it was held, had improperly refused to exercise their fiduciary powers on the 17th, the day before the transfer was sent, for the purpose of enabling those who held shares to escape from their liability.

In this case the directors, except Mr. *Hallett*, were acting according to their duty in making the call. I do not say that *Gilbert's Case* (1) is any authority for the proposition that the point of time which is to be regarded in these matters is the sending in of the transfer, but in other respects, that is to say, with regard to the exercise of this power of making a call on the part of the directors, the case is very like the present; but, and this is the point in that case, the transfer was set aside, although there was no resolution to make a call at the time when the transfer was sent in, and, as I have said, the transfer was set aside, although it had been in fact registered on the 20th of April.

The case on which counsel for Mr. *Hallett* relied in support of this proposition that the time to be regarded in these matters is the moment at which the transfer is placed in the hands of the secretary is *Reg.* v. *Inns of Court Hotel Company* (2). In that case, when the transfer was sent in, the transferor was actually indebted to the company, and that debt he paid, but in the meantime, not for the purposes of the company, but for the purpose of preventing any transfer of shares being made, the directors, though the affairs of the company did not require that a call should be made, made a call, and, as Mr. Justice *Mellor* held, they made a call not *bonâ fide* but simply to prevent transfers. That was the case he had to deal with. He did, according to the report which I have of his judgment, towards the end of it say this (3): "I think that the impediment to the registration, arising out of the fact of the shareholder being indebted to the company, must be determined by the state of things existing at the time that the deed of transfer is presented for registration to the company," and upon that Mr. *Hallett's*

(1) Law Rep. 5 Ch. 559. (2) 11 W. R. 806.
(3) 11 W. R. 807.

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counsel found their argument that the phrase "presented to the company" means sent in to the secretary. I do not see any ground for saying that that is the meaning of the learned Judge. "Presented to the company" means presented to those officers of the company, namely, the directors, who have the right to see the transfer, and I do not, as I read the whole case, think that Mr. Justice *Mellor* intended to decide the point on which the case, or that *dictum* in the case, is now cited to me.

The result is that I think the call was duly made, and that I think the point of time to be taken into consideration was when the transfer came before the meeting of the directors on the 18th day of December, as I say in due course and in due order of the business.

There is one point, however, which remains to be considered for Mr. *Hallett:* it is said that the resolution was not a valid resolution for the call, and the ground for this argument is that there is no time fixed in the resolution itself for the payment of the call.

Now the first observation against that argument is that the resolution is precise, "That the remainder of the capital of the company be, and is, hereby called up and payable as follows," and I read it, having regard to the omission to insert the date in the resolution itself, as a call of the capital to be paid at a day hereafter to be resolved upon. Afterwards the secretary filled up the date, perhaps without sufficient authority, but that is immaterial, because the directors at a subsequent meeting did confirm what he had done, and so subsequently to the 18th of December the time for payment of the call was duly resolved.

Now I refer, following the agreement, to the articles which bear upon this point, the 42nd, 44th, and 45th. The 42nd is: "All calls in respect of shares shall be deemed to be made at the time when the resolutions authorizing them are passed by the board." If I am right in my reading of this resolution, that article shews plainly that the call was to be deemed to be made on the 18th of December. The 44th article runs thus: "The board may by any subsequent resolution appoint a new time and place for payment of the call as regards such persons as have not paid the same"; now that article shews that if a time had been

inserted, and not left in blank, the directors could by a resolution have resolved upon a new time and a new place for payment. The 45th article runs: "Whenever any call in respect of shares is made otherwise than on allotment, twenty-one days notice of the time and place originally, or by any subsequent resolution, appointed for the payment thereof, shall, either at the time or any time after the call is made, be given to every member liable to the payment thereof."

In putting those articles together it is clear that there was a valid call made on the 18th of December, although, of course, until the time for payment had been inserted, and until the notice which is required by the 45th article had been given, no action could have been brought for the recovery of the call. Then there is no question about the notice of the call, because Mr. *Hallett* himself being a director was present at the meeting at which this call was made.

The result, therefore, is that I think the motion fails, and I dismiss it with costs.

G. M.

C. A.

From this decision *Hallett* appealed.

The appeal was heard on the 1st and 3rd of June, 1889.

Romer, Q.C., and *Maidlow*, for *Hallett*:—

First, we say that no proper call was made at the meeting of the 18th of December, when our transfer came before the board for registration, for no "time" for payment was fixed by the resolution as required by the articles, and the subsequent insertion of a date by the secretary at his own discretion was clearly improper.

[LORD ESHER, M.R.:—Have you any authority as to what is necessary in order to make a good call?]

No; but there is authority that directors of a company cannot properly fix a time for making a call by merely giving the secretary a verbal direction to issue notices making the call payable on a certain day: the time must be fixed by resolution: *Johnson* v. *Lyttle's Iron Agency* (1). Here it does not even appear that the secretary received any instructions to insert the date.

(1) 5 Ch. D. 687.

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[COTTON, L.J.:—Mr. Justice *Chitty* seems to have considered that the effect of the resolution was to make a call "at a time hereafter to be fixed."]

We submit that a call cannot be created in that way: it is not a call until the time for payment has been fixed by resolution: *Johnson* v. *Lyttle's Iron Agency* (1). Secondly, even if the call was made at the meeting of the 18th of December, it was so made after the transfer was sent in for registration. It is immaterial that the consideration of this and other transfers, though taken out of the proper order on the agenda paper, was postponed until the resolution had been passed, for the transfer had, under arts. 26 and 32, been sent in for registration to the proper officer specified, namely, the secretary, before the meeting at which the resolution was passed was held. It is said that the resolution for the alleged call made the transferor "indebted" to the company, and that, therefore, under art. 27, the directors had a discretion to refuse registration of the transfer; but if there was no call, as we contend there was not, there was no indebtedness at all; and even if there was a call, there was no indebtedness at the time the transfer was presented for registration by being sent in to the secretary, which was the proper time to determine the question of his indebtedness: *Reg.* v. *Inns of Court Hotel Company* (2).

[FRY, L.J.:—Does not the right of the company to call up the unpaid capital create a debt on the part of the shareholder under sect. 16 of the *Companies Act*, 1862?]

The section only says that all moneys "payable by any member shall be deemed to be a debt due to the company;" but nothing is "payable" until a call is formally made; and then, and not till then, the amount payable by virtue of the call becomes a debt.

Accordingly, as *Hallett* was not "indebted" to the company when he presented his transfer for registration, there was no discretion left to the directors under art. 27 to refuse registration; they were bound in that case to register, the registration being a purely ministerial act which they were bound to perform: *Weston's Case* (3). It is not seriously contended that the transfer to *Jones*

(1) 5 Ch. D. 687. (2) 11 W. R. 806.
(3) Law Rep. 4 Ch. 20.

was a sham transaction, for the value of the shares was actually paid.

Maclean, Q.C., and *C. B. McLaren*, for the company:—

As to the postponement, at the meeting of the 18th of December, of the consideration of the transfers until after the resolution for the call, art. 90 clearly enables the directors at a board meeting to regulate their proceedings as they think fit.

The main question is, whether the resolution of the 18th of December was a good resolution for a call. We submit that it was. It was not necessary that the resolution for the call should contain the date of payment. Arts. 38, 42, 44, and 45 shew that the date may be fixed by subsequent resolution. A resolution for a call is a declaration that it is necessary to call up the capital.

[FRY, L.J:—But you already have a declaration in the articles themselves that the capital may be called up.]

The first resolution is a declaration of the call by the proper officers of the company; then, when the date of payment is fixed by the subsequent resolution of the 17th of January, that second resolution relates back to the first, so that there is in effect one resolution, and under art. 42 the call is to be deemed to have been made at the date of the first resolution authorizing it.

Johnson v. *Lyttle's Iron Agency* (1) really supports our view, that a call may be effectually made by resolution without fixing the date, which may be fixed by a subsequent resolution and direction: pp. 690, 691. But that case was one of forfeiture of shares for non-payment of calls; and the Court held that there could be no forfeiture unless every condition precedent in the contract between the company and its shareholder was strictly and literally complied with.

As to *Reg.* v. *Inns of Court Hotel Company* (2), we submit that in the case of a transfer of shares the proposition, that the point of time when you are to ascertain whether a shareholder is or is not indebted to the company, is the moment when the transfer is left at the company's office for registration, is not sound. The

(1) 5 Ch. D. 687. (2) 11 W. R. 806.

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point of time at which the question of indebtedness is to be determined would more properly seem to be when the transfer comes before those officers of the company, namely, the directors, who alone are the persons to decide whether the transfer shall be registered or not, and whether there is indebtedness or not. But a shareholder, from the time he takes his shares, is in fact indebted to the company for the amount remaining unpaid upon them.

But even if the resolution of the 18th of December was bad, there is an equity against *Hallett* by reason of his being a director as well as a shareholder, disentitling him to any relief under sect. 35.

As director he was trustee for the general body of shareholders of his power of making a call, and he could not use, or abstain from using, that power for the purpose of benefiting himself. It was his duty as director to see that the call was properly made, since he knew it was necessary, and in fact imminent, on account of the pressure by the company's bankers; yet he abandoned his duty as director in order to get rid of his personal liability as shareholder. Seeing, then, that he stood in a fiduciary relation to the shareholders to make this call, this case must be decided on the equitable principles incident to such a relationship: *Ex parte Parker* (1); *Gilbert's Case* (2). It does not therefore lie in *Hallett's* mouth as director to say that the resolution of the 18th of December was not a good resolution. We do not say that a director may not part with his shares; he may, no doubt, do so at any time, provided that in doing so he does not allow his interest to conflict with his duty.

LORD ESHER, M.R.:—

This was an application made under sect. 35 of the *Companies Act*, 1862, to obtain a declaration from the Court that the company ought to have registered a transfer of certain shares, 2000 in number, that belonged to the Applicant, Mr. *Hallett*. The learned Judge has declined to make that declaration. The facts of the case appear to be these. The company is a company formed under a memorandum and articles of association. Mr.

(1) Law Rep. 2 Ch. 685. (2) Law Rep. 5 Ch. 559.

Hallett was the holder of shares to a larger number of shares than the 2000 he transferred. He was also a director of the company. On the 15th of December, 1888, the company was indebted to its bankers, and, as it appears to me, was not in a prosperous state. The bankers were pressing for the money which was due to them, and on the 15th of December, I think, Mr. *Hallett*, he being a shareholder and also a director, did know that the company was not in a prosperous state, and did know that within a very short time, not that any time was then fixed, but that within a very short time in all probability a call would have to be made; and on the same 15th of December he transferred 2000 of his shares to a solicitor's clerk—I believe it was the clerk of his own solicitor—for £80; and I should draw the inference myself that Mr. *Hallett* did so transfer these shares in order to avoid the prospective call which he saw would very soon come; but it is not suggested that he was making a nominal transfer to the clerk with the intention of keeping the shares in his own power or under his own control. It was, then, a real transfer made with the motive I have stated. The transfer having been perfected, so far as it could be perfected, by the execution of the proper document, it seems to have been sent for registration under art. 26 of the articles of association, and to have been sent to the proper person appointed by art. 32 for that purpose, namely, the secretary of the company. I am clearly of opinion that, by the articles of association of this company, unless there was something else in the case, there was no discretion in the directors to decline to register the transfer. They were bound to register it. The registration would be a purely ministerial act; but, if the transferor was indebted to the company, either for calls or otherwise, then, according to the articles, the registration could not take place without the consent of the board; that is to say, in that case they would have a discretion. The transfer seems to have been sent to the secretary some day before or on the morning of the 18th of December. In the afternoon of the 18th there was a meeting of the board of directors. It did not seem to have been summoned for the specific purpose of making a call, but at that meeting, Mr. *Hallett* being present, the board did pass a resolution to call up the remainder

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of the capital of the company by successive calls of 5*s*. per share. But they inserted no day or time or place when or where the calls were to become payable. Something happened with regard to that resolution which I cannot help thinking was most dangerously irregular; for the secretary, either in consequence of some supposed power vested in him, or of some idea of his own, some time afterwards inserted in the minutes of the meeting of the 18th certain dates as the dates of the calls. In my opinion that was the most dangerous thing that could well be done. Minutes of board-meetings are kept in order that the shareholders of the company may know exactly what their directors have been doing, why it was done, and when it was done; and any shareholder, looking at these minutes as they now stand, would suppose the dates were agreed upon at the meeting and were then filled in, whereas, in truth, no dates were agreed on by the directors at all. The dates formed no part of the resolution, and yet here is the entry made as if they formed part of the resolution then passed. I trust I shall never again see or hear of the secretary of a company, whether under superior directions or otherwise, altering minutes of meetings, either by striking out anything or adding anything. The proper mode of fixing the dates would have been by resolution, and then entering that resolution on the minutes.

I have now stated what took place on the 18th of December. It seems to me that there was no direction from the directors which could authorize the secretary to do anything with respect to the dates at any time after the 18th of December until the 17th of January, 1889, when a resolution was passed having the effect of fixing the dates.

That being the state of the case, the directors, at the meeting of the 18th of December, 1888, declined to enter this transfer on the register; and the question is whether they were entitled so to do. It is admitted that, but for some alleged equity, they were not entitled to decline to enter the transfer on the register unless they had a discretion under the articles; and that by the articles they had no discretion to decline to register unless the transferor was indebted to the company. It was urged on behalf of the company that Mr. *Hallett* was in point of fact "indebted" to the company within the meaning of art. 27—that from the

time he became a shareholder he was indebted in respect of the unpaid portion of his shares: but if that were held to be indebtedness, such articles as are now before us would mislead any person who proposed to become a shareholder of the company. A person takes shares in a company the articles of which say that there is to be no discretion in the directors to refuse to register any transfer he may make, unless he is indebted to the company. The argument is that from the moment he takes shares he is indebted for the amount of those shares; but then the clause which says that in case of his being indebted the directors are to have a discretion would be futile and misleading, because, if the contention is right, they would in point of fact have a discretion from the very first. That is not the meaning of the clause by itself. If, therefore, he was not indebted at the time when he had a right to ask the directors ministerially to register the shares, they had no discretion and were bound to do it.

Now, what is that time? It was argued that the time when the indebtedness is to be ascertained is the time when the question of registration is laid before the directors, and that, though a transfer in every respect valid has been sent to the secretary to be registered, that is not the time, but that the time is when the secretary lays it before the directors and they consider the matter. The answer is twofold; first, that the directors had nothing to consider, as the act to be done was purely ministerial; and secondly, that, if the directors were permitted to choose when they would do that ministerial act, the registration would be at the mercy of the secretary or the directors whether they would do that ministerial act; and if, in consequence of the postponement of that act, a call were made first, then, although the transferor was not indebted at the date of the transfer and at the time of its being sent in to the secretary, he would have become indebted, and the directors would, either through their secretary's delay or through their own delay, acquire a discretionary power which they would not have possessed but for that delay. In my opinion, the time when the indebtedness of the transferor is to be ascertained is, not when the transfer is laid before the directors, but when, according to the articles of association, it is sent in for registration to the proper officer, in this case the secretary.

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Then the question is whether Mr. *Hallett* was indebted at the time the transfer was sent in to the secretary for registration. Even if what took place on the 18th of December amounted to a call and made the shareholder on whom the call was made a debtor to the company, still, at the time when the transfer should have been registered, Mr. *Hallett* was not. That would be an end of the case had it not been for the equity which has been alleged, and which I will deal with presently.

But it has been strenuously argued that there was a good call on the 18th of December; and, as the question has been argued, I do not hesitate to express my opinion upon it. My opinion is, that there was no call whatever made on the 18th of December. In order to make a call within the articles of association, we must see what is necessary to be done to make a call. In the first place, there must be a resolution of the directors. They cannot do such a thing as make a call without a resolution. Then, what is to be done in passing a resolution to make a call? Art. 38 says the time and place for payment must be stated. [His Lordship read the article, and proceeded:—] Therefore, there could be no valid call in this company until the time and place for its payment had been appointed by the board; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the board. The article says, "as shall be appointed from time to time." I take those words to mean this: that the directors are not bound to make a call of the whole of the unpaid capital, but that they may make a call of part only, and that at another time they may deal with the rest, so that there may be successive calls until the whole of the capital has been paid up. After making a call, as for instance, of 5*s*. per share, if a particular number of shareholders do not pay on the day appointed, the directors may, under art. 44, appoint another day, but only after they have made a valid appointment of a certain day in the first instance; and then, owing to circumstances that have arisen since, they may appoint a further day on which those who have been called on to pay on the first day, and have not paid, are to pay the call; and then under arts. 46 and 51, if they do not pay on that further

day, the remedy of the directors is either by action or forfeiture. These provisions make the case stronger against the company, because they shew that there was no valid call made on the 18th of December, and that no time or place of payment was appointed until the 17th of January following.

But then it is said that the resolution of the 17th of January reverts back to the 18th of December: but, if there is a resolution passed that a call shall be made, and afterwards, on a subsequent day, a further resolution is passed naming a time and place for payment, the utmost that can be said is, that the two resolutions taken together make a valid call, but that there is no call until the latter day; that is to say, the first resolution must be carried down to the second. Therefore, if there was a valid call on the 17th of January, there was no valid call until the 17th of January; and, accordingly, there was no call which made Mr. *Hallett* a debtor to the company.

That being so, we now come to the equity. The equity was rather suggested than definitely stated by the learned counsel for the Respondents, and the argument went to this: that there was an equity against Mr. *Hallett* that a director cannot transfer his shares in order to avoid a prospective call, that is to say, a call which he knows, or ought to have known, will have to be, or will in a short time be, made. Now a shareholder may do so: that is well settled. If Courts of Equity had taken a very strict view of the matter, it might have been held that it was not within the right of a director to transfer his shares to avoid a prospective liability to the company, but there is no such authority to be found. It might have been so held. I do not say it ought to be so held, but I will merely say that it has not been so held. The Courts have, in fact, come to a contrary conclusion; therefore the company cannot rely on that contention.

Then, if that is not the equity, what equity is there? A case was cited in which a shareholder, who knew that a meeting was actually convened for a certain day in order to make a call, persuaded the directors to postpone making the call until a subsequent day, and the Court—which adopted the equity—drew an inference of fact, which was, that he persuaded them in such a manner as to let them understand that, if they did postpone

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making the call, he and others would not transfer their shares in the meantime. The Court therefore drew the inference that he made a representation to them that if they postponed making the call he would not transfer his shares. They did postpone the making of the call, and he did transfer his shares. That raised the equity against him. There is nothing of that kind here. Mr. *Hallett* did not persuade the directors to postpone the meeting or to delay coming to the resolution which they did come to. They did nothing on the faith that he would not transfer his shares in the meantime. They in fact knew that he had already done so; therefore, he cannot come within that equity.

Then the next equity raised against Mr. *Hallett*, was this:—that where directors are required to make a call at a certain time, and postpone doing so until a subsequent time in order that between the original time and the postponed time they may get rid of their shares, they cannot, by so attempting to get rid of their shares, escape liability, since they are trustees of the power of making calls for the general body of shareholders and must not use that power for their own benefit. But that equity does not arise here. There was no meeting of directors summoned to make a call. Mr. *Hallett* did not decline to assent to any call being made in order that he might get rid of his shares. Nor did he ask any of his co-directors to postpone making a call for that purpose. He had in fact already got rid of his shares. In my opinion neither of the equities that have been alleged can be raised against him. The only way of asserting an equity against him is to say that he transferred his shares at a time when he knew the company was in difficulties and that a call might have to be made; but there is no such equity, and no such equity was urged before the learned Judge below. It seems to me that this equity was only put forward as a last resource. I can see no reason why the directors should not perform the ministerial act of registering the transfer. They ought to have done so, and therefore I cannot agree with the decision of the learned Judge, to whose mind the reasons why there was no call made on the 18th of December were not, as it seems to me, sufficiently brought.

COTTON, L.J.:—

This is an appeal by Mr. *Hallett* against a decision of Mr. Justice *Chitty* under sect. 35 of the *Companies Act*, 1862, in which he refused to make an order to rectify the register of shareholders in this company by registering the transfer of certain shares from Mr. *Hallett* to Mr. *Solomon Jones*. The transfer of these shares was undoubtedly executed on the 15th of December, 1888, and was then sent in for registration at some time before the meeting of directors held on the 18th. The directors refused to register this transfer on the ground that at the time when they had to consider whether it should be registered, Mr. *Hallett* was indebted to the company for the call which they say had been made. In my opinion, it is not necessary to consider whether a call was made at that meeting on the 18th of December—and for this reason. Every shareholder in a company has a right to transfer his shares, according to sect. 22 of the Act, which says, "The shares or other interest of any member in a company under this Act shall be personal estate capable of being transferred in manner provided by the regulations of the company." That is a right incident to every shareholder; and we have to consider what are the regulations of this company with regard to its shareholders. [His Lordship then read art. 26, and continued:—] Have the directors any discretion as to the registration of a transfer brought before them under an instrument properly executed? In my opinion, there is no discretion left to them except in the case mentioned in art. 27. [His Lordship read the article and continued:—] So that the only circumstance where the directors have any discretion is that mentioned in this article, namely, where there is any indebtedness on the part of the person seeking to transfer; and it appears to me that, where an instrument of transfer executed as required by the articles is brought in for registration to the proper officer of the company, there is no discretion on the part of the directors to say that the transfer shall not be registered. It is the right both of the transferee and the transferor to have it registered, unless there are circumstances existing which give the directors a discretion whether they shall allow the registration or not. It is said that the transfer was not brought to the proper officer; but it was

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brought to the secretary, and art. 32 says this. [His Lordship read the article, and continued:—] All the formalities there required were followed and adopted in this case by Mr. *Hallett*, and although I come to the same conclusion as the Master of the Rolls that he executed this transfer in order to avoid a liability which he thought was coming upon him, yet it was a proper transfer, and when it was taken to the proper officer for registration there was no discretion left in the directors, and there was nothing to give them a discretion unless something subsequently happened which enabled them to say, "We now exercise a discretion which we did not possess at the time the call was made upon you."

That really disposes of the case; but as we have had a great deal of argument on the question whether there was a proper call made or not on the 18th of December, and as the Master of the Rolls has expressed his opinion upon the question, although it is not necessary for the question we have actually to decide, yet I will give my opinion upon it. On the same grounds as those stated by the Master of the Rolls I come to the conclusion that there was no proper call made on the 18th. When one looks at the articles, one sees what is meant by a call. When a man takes a share in a company, of course he thereby contracts with the company to pay the full amount of the share, but only to pay when and if the directors call for it to be paid up; and when one comes to look at art. 38 and other articles following it, I should say that a requisition on the shareholder to pay up the amount of his share should be by a resolution stating the amount to be paid and the time when it is to be paid. Mr. Justice *Chitty* seems to have thought that this resolution of the 18th of December was a resolution for a call to be "paid at a time to be hereafter fixed." Art. 38 is this. [His Lordship read it, and continued:—] This article does in fact express what would be implied without it, that when a call is made the time of payment should be stated.

Then art. 44 is decisive on the point. [His Lordship read the article, and continued:—] When there has been a resolution for a call properly so called, and the time for payment has been originally fixed by that resolution, any alteration from the original time fixed must be made by another resolution. This is reasonable enough; and the following arts., 45 and 46, shew that

notice of the call is to be given, and a certain time is to be allowed for payment after the appointed time; and that where a new time for payment is substituted for the original time the notice must date from the new time and not from the original time. Therefore, I hold that there was no call made on the 18th of December, but that there was a resolution that a call should be thereafter made. That resolution had to be followed by something which would make the proposed call properly a call, and that was done by the resolution of the 17th of January, and was adopted by the directors by their sending out notices of the call. As has been pointed out by the Master of the Rolls, it cannot be said that when a time for the call is fixed by a subsequent resolution it relates back so as to make the original resolution itself a resolution for a call; the period when a call is to be deemed to be made can only be at the date of the resolution fixing the time when the call is to be paid.

Then there is one other point. It is said there is an equity against Mr. *Hallett* which prevents the Court from exercising its discretionary power in his favour under sect. 35 of the *Companies Act.* I express my opinion in favour of the view that when there is an equity against an applicant for rectification of the register, the Court will not exercise the power given under sect. 35. There was a *dictum* by Lord *Romilly* to that effect. But what is the equity? In my opinion the proper rule is that a director is so far in a fiduciary position towards the company that he cannot exercise or refuse to exercise the powers vested in him as director against the interests of the company, and that he must exercise his powers for the general interests of the company. It was not contended that a director is a trustee of his shares for the company, but it was said that he is so far a trustee for the company that he cannot exercise the powers given to him as director for his own benefit. But the power to transfer is not given to him as a director, but as one of the shareholders; and therefore he is not prevented from exercising that right to transfer simply because he does it, not for the benefit of the shareholders, but for his own personal benefit.

Now let us look at the cases. *Ex parte Parker* (1) has no

(1) Law Rep. 2 Ch. 685.

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bearing at all upon the question as to what directors may do, because there the person seeking to transfer was not a director but an ordinary shareholder, who induced the directors at a board meeting to postpone the consideration of a call, and then, before the call was made, executed a transfer of his shares to a pauper to evade liability. Lord Justice *Rolt* said he could not do that, for he had represented to the directors, or led them to believe, that if they would postpone making a call he would not exercise his right to make a transfer. That case was founded on misrepresentation.

The other case cited, *Gilbert's Case* (1), was more in point, but the circumstances were entirely different. At a meeting of the directors, of whom *Gilbert* was one, it was agreed that a call should be made, but no formal resolution was passed, and the actual making of the call was postponed until a later day when a formal resolution for the purpose was passed; but before that later day *Gilbert* had executed a transfer and got it registered, which he could not have done unless the call had been postponed, and it was held that as the call was postponed for a purpose which was not honest, the registration of the transfer could not prevail against the company's creditors. But here there is nothing against Mr. *Hallett* which could make that case. He had a right to transfer at the time his transfer was presented for registration; and there was no indebtedness on his part to the company which would justify the directors in refusing to register.

FRY, L.J.:—

I am of the same opinion, and as the matter has been very fully discussed by my learned Brothers, I shall endeavour to be brief.

I think the question primarily turns on the 27th article. [His Lordship read it, and continued:—] Now, on the 15th of December, Mr. *Hallett* did execute a transfer of these shares to one *Jones;* and *Jones* did, at some time on or before the 18th of December, and, if on the 18th of December, certainly before the meeting of the directors on that day, leave the transfer for regis-

(1) Law Rep. 5 Ch. 559.

tration with the secretary. If Mr. *Hallett* was then indebted to the company, the directors had a discretion to exercise; but if he was not indebted, they had no discretion to exercise, and the secretary was bound to perform the ministerial duty of registering the transfer. The primary question, therefore, is, was Mr. *Hallett*, on the 18th of December, indebted in any sum of money to the company? There was no call due on his shares: he was indebted in no other way. It is plain, therefore, that at the time of the deposit of the transfer with the secretary, there was a power in the secretary to register the transfer. So far, the matter seems to me to be plain.

But then, it is said, we must look at what took place on the 18th of December. It is said that a valid call was then made, and that, the transfer not having been registered before the call was made, the call created a debt before registration. I have already expressed my opinion that the proper time for ascertaining whether there was any indebtedness, was the time when Mr. *Hallett's* transfer was left with the secretary; but I am also of opinion that what was said to be a call on the 18th of December was no call at all. In this company, according to art. 42, the fixing of the time was of the essence in the making of a call; in fact, I scarcely know what the making of a call is, except the fixing of the time at which the money is to be paid. I am clearly of opinion that, according to the constitution of this company, no call was made until the time for payment was fixed. All the articles, in fact, shew that the fixing of the time was an essential part of the call. Therefore, in my judgment, there was no call whatever on the 18th of December. I take the liberty of saying I entirely concur in the observations of the Master of the Rolls as to the impropriety of the manner in which the books of the company were dealt with. The minutes of the 18th of December did not originally fix any day for payment of the call. Afterwards it was filled in; but, what was worse than that, the directors issued a circular to the shareholders, stating the resolution as fixing the day when the call was to be paid. That is a circular one cannot read without regret.

Then it is said there is an equity which prevents Mr. *Hallett* from availing himself of this transfer. That equity is thus

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stated: it is said that a director holds the powers with which he is clothed, not for the benefit of himself alone, but for the benefit of the company as well, and that he cannot avail himself of any of those powers to the prejudice of the company. I ask myself, what power did Mr. *Hallett*, before the 18th of December, use for his own benefit? I answer, none before that date. Then, did he fail to exercise any power before that date? I cannot see that he did. The question of a call had not been before the board on any previous occasion before the 18th of December, and it was only on the previous day, the 17th of December, that Mr. *Blewitt*, the chairman of the company, received an intimation that the bankers of the company would not renew their loan, unless on the following day the board ordered a call of the unpaid capital. In my opinion, it is impossible to say that before the date of the 18th of December a call was necessary. Mr. *Blewitt's* affidavit shews that a call would only be necessary in case the bankers did not renew the loan; and Mr. *Blewitt* himself states that on the 18th of December there were other possible arrangements which the board hoped to make so as to avoid the necessity of making a call. Therefore, it is impossible to come to the conclusion that Mr. *Hallett*, at any time before the 18th of December, forbore, on his part, to make a call and so acted in his own interest.

It was pressed upon us that it was an improper thing for a person in the position of a director to seek to evade liability; and if we were sitting in a Court of honour our decision might be different. I do not myself uphold the conduct of this gentleman; but he has a legal right in favour of his claim, and we must give effect to it by ordering the company to register this transfer, and to pay him his costs of this application.

LORD ESHER, M.R.:—

I do not wish it to be supposed that my decision in this case rests only on the articles. I take it to be of the very essence of a call that the time and place for payment should be determined.

Solicitors for Appellant: *Lickorish & Bellord.*
Solicitors for Respondents: *Blewitt & Tyler.*

G. I. F. C.

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WHITE *v.* CITY OF LONDON BREWERY COMPANY.

[1880 W. 0385.]

Mortgagee in possession—Public-house—Account—Trade Profit—Proviso limiting Sums to be recovered on Mortgage.

Mortgagees in possession, who were brewers, let the premises with a restriction that the tenant should take his supply of beer entirely from them:—

Held (affirming the decision of *North*, J.), that the mortgagees must account for such additional rent as they would have made if the premises had been let without restrictions, but not for the profit which they made by the sale of beer to the tenant.

The mortgage was of a leasehold public-house to secure £700, and such further sums as might become due from the mortgagor to the mortgagees for money advanced, goods sold, or otherwise. The mortgage contained a power of sale, and it was declared that the sale moneys should after payment of the costs of sale, or in anywise consequent on the mortgagor's default, and the reimbursement to the mortgagees of all moneys paid by them for insurance or repairs, or for keeping on foot the lease and the licenses, be applied in payment of the principal and interest due on the mortgage, and subject thereto, in payment of the principal and interest due to a second mortgagee, and that the surplus should be paid to the mortgagor, "Provided always that the total amount to be recovered by the mortgagee under these presents shall not exceed £900." The property was sold under the power, and on the account being taken by the Court it was certified that at the time of the completion of the sale there was due to the mortgagees £1415 principal and £615 interest, and that they had or might have received £396 for rents and profits. The property sold for £2650. The £1415 included the £700 lent and £88 for goods supplied, the rest of it was made up of payments of rent and fire insurance:—

Held, that the proviso limiting the amount recoverable did not apply to interest, or to outgoings incident to the possession of the premises which the mortgagor was bound to reimburse to the mortgagees, and that as the sum due for moneys lent and goods supplied did not exceed the limit, the mortgagees were entitled to retain out of the proceeds of sale the balance due to them.

THIS was an appeal by the Plaintiff from a decision of Mr. Justice *North* (1).

By deed dated the 4th of February, 1868, the Plaintiff mortgaged to the Defendants a public-house held by him for a term

(1) 39 Ch. D. 559.

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of fifty years from Midsummer, 1861, at the yearly rent of £60. The mortgage was by demise, to secure £700 and such further sums as might become due from the mortgagor to the mortgagees for money advanced, goods sold, or otherwise, with interest as therein mentioned. *Sarah Cordwell*, a mortgagee for £580, joined for the purpose of postponing her mortgage. The mortgagor covenanted to pay to the mortgagees on demand the £700 and further advances with interest as before mentioned. It was provided that if default should be made in payment, the mortgagor would assign his licenses to the mortgagees. It was further provided that if any default in payment should be made the company might sell the premises. "And it is hereby declared that all moneys to arise from any such sale shall after payment of all costs and expenses incidental to such sale, or in anywise consequent on such default as aforesaid, and the reimbursement to the said company, their successors or assigns, of all moneys they may have paid, or be liable to pay, for the insurance, repairs, or otherwise, or for keeping on foot the said lease, and the licenses belonging to the said premises, be applied in or towards payment of the principal and interest moneys then due on the security hereof, and, subject thereto, in or towards payment of the principal and interest moneys then due to the said *S. Cordwell*, her executors, administrators, or assigns on her aforesaid mortgage, and the residue (if any) paid unto the said mortgagor, his executors, administrators, or assigns: Provided always, and it is hereby expressly declared, that the total amount to be recovered by the said company under these presents shall not exceed £900."

The company entered into possession in September, 1869, and obtained a transfer of the Plaintiff's licenses. They put in their own furniture, and carried on the business by a manager named *Moulton*. The business was in a very low state, and for some time was carried on at a loss. In March, 1871, they let the house to *Moulton*, with the furniture, at £30 for the first year and £40 a year afterwards, with a stipulation binding him to take his ale, beer, and porter from the company. The tenancy was determinable at three months' notice. £15 of the rent was for the furniture. *Moulton* found he could not make a living, and asked

for an abatement of rent, and the company accepted £30. In August, 1873, the business having improved, *Moulton* made over the premises to *Hake*, who bought the furniture from the company, and was accepted by them as tenant at £60, he also being bound to take his beer from the company. In September, 1879, *Hake* gave notice to quit, and in the same month the company sold the property for £2650, and the purchase was completed on the 24th of November, 1879.

In April, 1880, the Plaintiff commenced this action against the company and *Carr*, the transferee of *S. Cordwell's* mortgage, asking for an account of what was due on the company's mortgage, an account of rents and profits of the mortgaged premises on the footing of wilful neglect and default, that the company might be charged with an occupation rent for the time they were in possession; an account of the profits of the business carried on upon the mortgaged property by the company or their agents; an account of the proceeds of sale, and payment of what should be found due from the company on the accounts.

The judgment dated the 27th of April, 1881, directed: 1. An account of what was due to the company under the mortgage. 2. An account of all sums of money laid out by the company in necessary repairs and lasting improvements, with a direction that interest should be allowed on them. 3. "An account of the rents and profits of the mortgaged hereditaments" received by the Defendant company, or by their order or for their use, or which without their wilful neglect or default might have been received. 4. Without prejudice to any question in the action an inquiry as to what profits were made by the Defendant company in carrying on the business in the pleadings mentioned since they took possession of the mortgaged premises, and what sums might properly be allowed to the company for skilled labour and expenses out of pocket in carrying on such business.

The Chief Clerk, by his certificate, filed on the 12th of May, 1888, certified (1) that there was due to the company on the 24th of November, 1879, £1415 17*s.* principal, £615 15*s.* 3*d.* interest, and £134 16*s.* 4*d.* mortgagees' costs; that the property had been sold for £2650, out of which the company had paid

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to *Carr*, as second mortgagee, £377 7*s.* 3*d.*; (2) that the company had laid out in necessary repairs and lasting improvements £380 4*s.* 9*d.*, and that the interest thereon amounted to £103 17*s.* 4*d.*; (3) that the company had or without their wilful default might have received rents and profits to the amount of £396 9*s.* 10*d.*; that the Plaintiff had brought in a surcharge for £1991 18*s.* 9*d.*, the profits on beer supplied by the company to the premises from December, 1869, to 30th of September, 1879, and that he had disallowed it; that the result of the account was that there was due from the company to the second mortgagee £18 11*s.* 11*d.*; (4) no profits had been made by the company in carrying on the business, but their carrying it on resulted in a loss of £272 12*s.*

The £1415 17*s.* principal, found in answer to account (1), was made up of the £700, £88 5*s.* 9*d.* due in September, 1869, for beer supplied, and payments for rent to the landlord of the premises, and for fire insurance.

The case came before Mr. Justice *North* on summons to vary the certificate and for further consideration. His Lordship held that the mortgagees could not be charged with the profits made by them on beer supplied, but that they were chargeable with such rent as might have been obtained if the premises had been let free from any restriction to take the beer from a particular firm, and he charged the mortgagees with £20 a year extra rent from August, 1874, a year after the commencement of *Hake's* tenancy.

The Plaintiff appealed.

Cozens-Hardy, Q.C., and *A. àB. Terrell*, for the Appellant:—

We submit that the Defendants, as mortgagees in possession, are not entitled to the profits made by them from the supply of beer. A mortgagee is entitled under his mortgage only to his principal, interest, and costs, not to any extra benefits or profits. Here the mortgagees imposed the condition as to taking beer on their own tenants; the profit so made cannot belong to them but to the mortgagor. Even if we are allowed only a difference of rent, the amount allowed by Mr. Justice *North* is on the evidence insufficient.

Napier Higgins, Q.C., and *J. D. Fitzgerald*, for the brewery company:—

[LORD ESHER, M.R.:—You need not address yourself to the profits on beer supplied.]

That was the main contention. The question as to extra rent was hardly raised below. The evidence is in a very unsatisfactory condition, and leaves it questionable whether a higher rent could have been obtained if the property had been let free from the restriction as to the supply of beer. At all events, it is impossible to make out from the evidence that the Judge has not allowed enough in respect of extra rent. Then as to the proviso limiting the amount to be recovered, it never was intended to apply to expenses incurred in consequence of our being in possession, which really come under the head of just allowances, not of principal moneys due on the security. The mortgagor cannot get the benefit of our payments for rent and insurance without recouping us: *Shepard* v. *Jones* (1). The true meaning of the proviso, though it is worded in a slovenly way, is that the moneys lent and goods supplied are not to exceed £900.

Cozens-Hardy, in reply:—

If the company had sued us on our covenant to pay, the proviso would have limited the amount that could be recovered.

[COTTON, L.J.:—Does not the question rather turn on the direction as to the application of the proceeds of sale?]

LORD ESHER, M.R.:—

In this case the Plaintiff, who is a small publican, took a public-house in the *Isle of Dogs*, and having no money with which to carry on business, he was obliged to borrow. In such a case it is usual to borrow from brewers, and the Plaintiff borrowed from the Defendants the brewery company, to whom he gave a mortgage of his public-house to secure £700 advanced at once, and such further sums of money as they might thereafter advance, with a proviso that the sum recoverable under the security should not exceed £900. The business turned out a total failure.

(1) 21 Ch. D. 469, 477.

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Thereupon the Plaintiff's creditors issued writs against him, and those writs were put in the hands of the sheriff. Upon that the mortgagees, in 1869, exercised their right to take possession of the mortgaged premises. They had a right to take possession, and also a right to sell. They kept possession from the time they first took it until they sold, which was ten years later. Out of the money which they got on the sale, they paid themselves the money which they had lent to the Plaintiff, and all the expenses to which they had been put by reason of their being obliged to take possession in order to protect themselves from what?—from the Plaintiff's breach of his covenants. He had covenanted, of course, to pay interest, to keep the premises insured, to pay the rent, and to do repairs. Having paid themselves what they say they are entitled to, there was a surplus, and that surplus they would have handed to the Plaintiff, but that he had mortgaged the premises to another mortgagee over whose security theirs had priority, so they paid the surplus to the second mortgagee.

Proceedings then were taken in the Plaintiff's name, calling upon the brewery company to account for the purchase-money which they had received on the sale, and for the rents and profits during the time of their being in possession. That the proceedings in reality are taken in favour of the second mortgagee can hardly be doubted.

Everything in these proceedings was done in the worst form possible, and perhaps in strictness the case ought to be tried by us according to the ill form in which it is brought before us, but we do not like to determine people's rights by the ill form in which they have conducted their proceedings, if we can get at the substance of the case. If we were to deal with the case according to strict form, I apprehend that the Appellant would have no chance at all, and would not before the learned Judge below have got so much as he has. But disregarding the form, let us see what must be the rights of the parties. First of all, as I say, the nominal Plaintiff had borrowed £700 upon a security that was to cover that sum and further advances, subject to a proviso which really came to this, that if they lent him more than £900 they should not be able to rely on the mortgage as a

security for the excess. They have not lent him more than £900, and the amount named in the proviso not having been exceeded, we may, in my opinion, consider the matter as if there was no proviso at all. Then the Plaintiff commits breaches of his covenants, and the company takes possession. Now they are bound to account to him after the sale—for the proceeds of the sale—for any rents which they have received, or but for their wilful neglect or default might have received, from the property while they were in possession—and for any profits which, during that period, they made out of and by the mortgaged property. They have not to account for anything more, and as against that they are entitled to set the expenses which they have fairly incurred in consequence of having been obliged to take possession, and keep possession, and to sell. They have a right to set off against the sale the expenses of the sale. They have a right to set-off against the rents and profits they have received, any rents they have been obliged to pay (inasmuch as this was leasehold property), and any insurance they were obliged to pay, and anything else which was an expense put upon them by reason of their being obliged to take and keep possession—expenses which they were obliged to incur in order to receive the rents and profits which they are to account for.

But the nominal Plaintiff says: "No, you must account to me for the profits which you have made upon beer which you have supplied to the house, as being part of the rents and profits which you have got out of the mortgaged property." Can those profits on beer supplied to the house be said to be profits by and out of the premises? Such an idea seems to me simply preposterous, and we cannot entertain it. Has anybody ever thought that such profits were to be brought into the account? Mortgages of beer-house premises are of everyday occurrence, and the failure of the mortgagee to repay the brewer is a matter of every other day occurrence. Have the publicans who have fallen by the way in such numbers ever thought of raising this question? Not one. Neither did this man. It is the second mortgagee who thought of this. I suppose somebody has put this experiment into his head, it is an experiment which failed in the Court below, and which fails here.

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The question as to profits on beer was the real fighting part of the case, and if the learned Judge had refused to consider anything else in the matter nobody could have objected. The Plaintiff was playing for high stakes. He did not care about the difference of rent, he wanted £1990 to be brought in and then his surplus of a little less than £400 would have been nearly £2400. If a man plays for such high stakes and utterly fails, I feel inclined to say "you cannot turn round when you have failed on that, and say you are entitled to a trifling advantage on another view of the matter." But the learned Judge took a more indulgent view and said to the mortgagees: "You took possession of the property, and you let the property; you were bound to the mortgagor to let it for a fair rent, you had no right, for instance, to let those premises for nothing, and then make a profit out of supplying beer to them. If you did not let the property for as good a rent as you could reasonably get, you ought to account for the difference between what you did let it for, and what you ought to have let it for." The learned Judge dealt with the matter upon that footing, and if he was to deal with it at all, that was the right footing. What the fair rent was is a matter of evidence, and the evidence here is as bad as the pleading, it goes to every point except the real point in the case. Now does the evidence shew that the mortgagees let this house at any time for a less rent than they ought to have got? For the first two years they kept it in their own hands. There is no question but that they had a right to keep it in their own hands, and the evidence is that if they had tried to let it at the time when they took possession they could not have got a tenant. The brewers then put in *Moulton* as their servant, and the value of the business is carried from nothing at all, by their money and by their servant, to something. After this *Moulton* takes the house at a rent of £30 for the first year, and £40 for the next, and he was to take his beer from them. He found that he could not make anything of it, and asked them to reduce his rent to £30, and half of that was for furniture which belonged to the company. The evidence is clear that nobody at that time would have given more. In 1873 *Hake* came at a rent of £60, and the evidence is that nobody would at that time have given more

than he gave. The learned Judge came to the conclusion that from the year 1874 to the year 1879 the property was let for a less rent than might have been got if there had been no stipulation to take beer from the company, and there being no evidence given on behalf of the Plaintiff what amount of rent ought to have been got, the learned Judge was obliged to make a guess, and he allowed £20 a year. If he had given only £10, the Plaintiff could not have complained. He has got £100, which will go perhaps to assist the second mortgagee to pay the costs for which I have no doubt he is liable, and with that he must be content. The appeal must be dismissed.

COTTON, L.J.:—

This case came on upon further consideration, and a motion to vary the Chief Clerk's certificate. The action was brought by a mortgagor against the mortgagees who had been in possession and had sold the mortgaged property, to take an account of what the mortgagees ought to hand over to the second mortgagee or to the Plaintiff, out of the moneys which had arisen by the sale. The sale is not in any way impeached, but on various grounds it is contended that the certificate ought to be varied so as to be less favourable to the mortgagees. The great contention was that the mortgagor was entitled to the profits made by the mortgagees as brewers in supplying the mortgaged property, which was a public-house, with their own beer. Now, first, is that question open on this decree?

There are two clauses in the decree under which it is said to be open. The first of them is an account "of the rents and profits of the mortgaged premises received by the Defendant company or which without the wilful default of the Defendant company might have been so received." In my opinion the profits of the brewers from supplying beer, do not come within that. They are not profits of the mortgaged hereditaments, they are profits of the brewers' business, which is not in any way carried on upon the mortgaged premises. I know of no authority, and Mr. *Cozens-Hardy* can give me none, that a mortgagee is bound to account for any profits thus made. There was a suggestion that the mortgagee was in some respects in the same position as a trustee,

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but that was not pressed. As regards certain matters no doubt a mortgagee is liable to the same obligations and restrictions as a trustee, but he is not a trustee, and there is no authority to shew that if a mortgagee of a public-house who is a brewer supplies the public-house with his beer, he is liable to account for the profits he makes by so supplying it.

The other clause of the decree under which it is said that this point is open, is that directing, without prejudice to any question, an inquiry what profits were made by the Defendant company in carrying on the business in the pleadings mentioned since they took possession. In my opinion that does not in any way touch the question. The business there referred to is not the brewery business, but the business of the public-house, and this inquiry is directed to such profits (if any) as were made by the Defendant company in the business carried on in the public-house during the period they were in possession by their manager or servant, and in no way gave the Plaintiff any opportunity of raising this question, nor entitled him to make the defendants account for any profits they made as brewers, not in carrying on the business of the public-house, but in carrying on their own business. That was the main contention. The Plaintiff's claim was disallowed in Chambers before the Chief Clerk, and then was disallowed by the Judge, and I think it was rightly disallowed.

There is then another point to be considered. A mortgagee in possession must account for the rents which, but for his wilful default, he would have received. The Plaintiff says that if he fails as to the brewers' profits yet he ought to have a larger sum in respect of the rents which the mortgagees would, but for their wilful default, have received. I think the learned Judge was a little indulgent to the Plaintiff, but in these days if there is a question to be decided on the evidence before the Court, we are not inclined to restrict the suitor very closely to the pleadings. The learned Judge has allowed an addition of £20 a year from the 19th of August, 1874, down to the date of the sale, in addition to the rent obtained by the mortgagees. Before 1873, there had been a period during which the brewers were in occupation by their servant, then a period during which they let nominally at £30, but really at £15 a year, since half the £30 was paid by the

tenant for the furniture and fixtures which belonged to the brewers; and then a period of letting at £60 a year. I was rather struck at first at there being no occupation rent charged against the brewers while they were in possession by their servant; it does not appear to have been asked for, but if it had been, is any case made for giving it? I think the evidence is the other way. At the time the brewers took possession, the trade in the neighbourhood was in a bad state. We know that when trade is in a bad state workmen have not money to spend in beer, so the custom would fall off, and when a public-house has got into a low state there is a difficulty in re-establishing its business. This house at the time when the brewers took possession could not be let, because nobody could carry it on without a loss, as the brewers found by experience. As soon after as they could let it at all, they let it to *Moulton*, who found a rent of £40 too high, and was allowed to remain at a rent of £30. On the evidence before us, there is nothing which satisfies my mind that they could by any possibility have obtained a larger rent than that, during the tenancy of Mr. *Moulton*. Then I think the learned Judge was right in saying, when there was a change in the tenancy, that there was no ground for charging the brewers with more than the £60 rent which they received from *Hake* during the first year of his occupation; but after that time, when he had established himself, the learned Judge thought that something more ought to be allowed. The evidence on that question is of a somewhat doubtful character, but I think the Plaintiff has not established that more should be given him than what the learned Judge has allowed, viz. £20 a year, which comes altogether, as the Master of the Rolls has said, to £100.

There is one other point to be considered. The mortgage contains a proviso limiting the amount to be recovered by the company under it to £900. The mortgage is a mortgage for £700, and for such other sums as might be due from the mortgagor for money advanced or goods sold and delivered, or upon any other account whatsoever, and in a mortgage of that kind there must be some limit to the amount to be secured to the mortgagees. I think the certificate is framed in a somewhat awkward way in finding that there was due £1415 17*s.* principal,

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without mentioning how it was made up. It consisted of principal moneys of some sort, but only £788 5*s.* 9*d.* was due in respect of the £700 originally advanced, and goods supplied, and as I understand the proviso, it only applied to the £700, sums afterwards advanced, and money due for goods supplied, and as the amount of these did not exceed £900, the limit was not exceeded.

Let us look at the declaration as to the application of the moneys arising from the sale. "All moneys to arise from any such sale shall, after payment of all costs and expenses incidental to such sale, or in anywise consequent on such default" (that is default in payment of the money) "and the reimbursement to the said company, their successors, or assigns, of all moneys they may have paid or be liable to pay for the insurance, repairs, or otherwise, or for keeping on foot the said lease and the licences belonging to the said premises"—these moneys then were first to be paid out of the money arising from the sale—and after this the money is to be "applied in or towards payment of the principal and interest moneys then due on the security hereof." That is entirely distinct from reimbursing the mortgagees what they paid for insurance or for repairs, or in any other way for keeping the security on foot. In my opinion the proviso limiting the amount to be recovered does not apply to the moneys which the mortgagees can claim for their reimbursement, but simply to the principal moneys due on the mortgage, which are to be paid out of the sale moneys after the sums directed to be reimbursed have been paid, and does not prevent payment beyond the £900 either for interest or in respect of anything which is directed to be reimbursed. The objection on this ground, therefore, cannot be taken as a good objection. In my opinion the appeal fails.

FRY, L.J.:—

The main contention in the present case is a claim on the part of the Appellant to receive a share of the profits made by the Defendants in brewing beer supplied to a public-house. In my judgment that question does not arise here. The statement of claim asks for "an account of the rents and profits of the mort-

gaged premises received by the Defendant company," but it does not claim any portion of the profits made by them in brewing beer supplied to the tenant of the house. The decree follows the same lines. It directs an account of the rents and profits of the mortgaged hereditaments. It also directs an account of the profits made by the Defendants whilst actually carrying on business on the mortgaged premises, but it does not direct any account of the profits made by them in brewing the beer. I think, therefore, it is entirely out of the question to raise that point in the present case. Whether, if it were raised, it would have any chance of success is very doubtful. I do not doubt that if the mortgagee be a brewer, and let the house with a covenant to take all the beer from himself, and it can be shewn that he could have got a larger amount if the house had been free from that covenant, the mortgagor either under the wilful default clause or otherwise, must have some relief in respect of the difference between the two rents. And some relief has been given him in the present case, but I think the claim for a share of the profits made by the brewers in supplying beer is entirely outside this order.

With regard to the rest of the case, I shall content myself with saying that I entirely concur in the judgments which have been pronounced by the Master of the Rolls and Lord Justice *Cotton*.

Solicitors for Appellant: *Carr & Co.*
Solicitors for Defendant Company: *Western & Sons.*

H. C. J.

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July 13.

In re BROOSHOOFT'S SETTLEMENT.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), s. 80 [*Revised Ed. Statutes, vol. ix. p.* 646]—*Costs—Railway Company—Land compulsorily taken—Purchase-money—Dealings with Land subsequently to Payment into Court—Payment out of Court.*

A railway company, under their compulsory powers, took land comprised in a settlement, and paid the purchase-money into Court. A testamentary appointment was subsequently made by the tenant for life under a power contained in the settlement, and on her death a petition was presented by her appointees for payment of the money out of Court. In consequence of the terms of the appointment, it became necessary to serve the petition upon the trustees of the marriage settlements of two of the appointees, and additional costs were occasioned:—

Held, that the railway company, having taken the land subject to the possibility that in ordinary events it might be dealt with by way of settlement, must pay the costs (not being costs of adverse litigation) of all parties.

Quære, whether the same principle is not applicable to costs occasioned by incumbrances effected subsequently to the payment into Court.

PETITION.

By a marriage settlement dated in 1860, certain lands were conveyed to trustees in trust for *Sarah Brooshooft* for life, and subject thereto upon trust for her children by a former marriage as she should appoint. The settlement contained no power of sale.

Under the powers of a special Act of 1880, which incorporated the *Lands Clauses Consolidation Act*, 1845, the *Hull, Barnsley, and West Riding Junction Railway and Dock Company* took certain lands which were subject to the trusts of the settlement, and paid the purchase-money of £2842 into Court.

In August, 1883, an order in the usual form was made, upon the petition of the trustees, for investment of the money, and payment of the dividends to the trustees.

Sarah Brooshooft, by her will, dated in January, 1885, purporting to exercise the power of appointment contained in the settlement, directed that the trustees of the settlement should stand possessed of the settled property upon trust for the Petitioners, her son, *Oscar Wilkinson*, and her daughters, *Mary*

Boynton and *Louisa Barton*, as tenants in common, and directed that the shares of her daughters should be conveyed to and vested in the trustees of their respective marriage settlements (which were dated respectively in March, 1856, and December, 1857), upon the trusts therein contained in favour of her daughters and their respective children. *Sarah Brooshooft* died in December, 1888.

This was a petition asking that the fund in Court might be applied in payment of succession duty and the residue paid to the Petitioners in equal thirds, and for the usual order for payment of costs of all parties by the company pursuant to the 80th section of the *Lands Clauses Act.*

The petition was served on the trustees of the settlement of 1860, the trustees of the marriage settlement of *Mary Boynton*, on the co-trustee with the Petitioner *Oscar Wilkinson* of the marriage settlement of *Louisa Barton*, and on the company.

Upon the hearing of the petition the question was raised whether or not the effect of the appointment was to constitute *Mary Boynton* and *Louisa Barton* tenants in tail of the one-third shares appointed to them by the will of *Sarah Brooshooft*, and, after some discussion and an adjournment of the hearing with a view to the consideration of the question, they ultimately by their counsel expressed their intention to execute disentailing assurances.

The only question which calls for a report was as to the costs which the company were liable to pay.

Renshaw, Q.C., and *Edward Martin* for the Petitioners.

Davenport, for the trustees of the settlement of 1860.

F. H. Colt, for the trustees of *Mary Boynton's* settlement.

Curtis Price, for the trustees of *Louisa Barton's* settlement.

J. H. Gregson, for the company:—

I submit that the company ought not to be ordered to pay the additional costs occasioned by the dealings with the property subsequently to the payment into Court. This is in accordance with the practice as laid down by the more recent authorities

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and settled by the decision of *Bacon*, V.C., in *In re Gough's Trusts* (1); see also *Re Jones's Trust Estate* (2). Those are, no doubt, cases of incumbrances effected subsequently to the payment in, but the principle must be the same in the case of other dispositions.

[KAY, J., referred to *Eden* v. *Thompson* (3).]

That case was cited in *In re Gough's Trusts*, but was not followed, and the principle was there clearly indicated that the liability of the company to pay costs does not extend to costs occasioned by dealings with the fund by the owners after payment into Court.

[KAY, J., referred to *Re Lye's Estates* (4), *In re Pick's Settlement* (5), and *In re Shakespeare Walk School* (6).]

In re Gough's Trusts was a subsequent decision. It is clear that the costs have been considerably increased by reason of the appointment made by *Sarah Brooshooft*, which has rendered it necessary that the interests of the beneficiaries under the two settlements made upon the marriages of her daughters should be represented, and has added greatly to the length of the petition.

KAY, J.:—

I confess I think the railway company ought to pay the costs, because otherwise the result would be this: a railway company would take a man's land compulsorily—I will assume for a moment that he is entitled in fee simple, so that no one could interfere in any way with his dealing with the land—and when they had taken it and had paid the money into Court, the expenses of his dealing with his land might be increased by what they had done. Now if, in the ordinary course of dealing with the property, the owner makes a settlement, and then an application is made by persons interested in that settlement for the payment of a fund or of a dividend, why are not the company to pay those costs? How can they reasonably say, "Because you have settled the property, which you had a perfect right to do, after we had converted it and paid the money into Court, you,

(1) 24 Ch. D. 569.
(2) 18 W. R. 312.
(3) 2 H. & M. 6, 9.
(4) 13 L. T. (N.S) 664.
(5) 10 W. R. 365; 31 L. J. (Ch.) 495.
(6) 12 Ch. D. 178.

the person who have settled it, or persons claiming under that settlement, shall be put to additional cost, by reason of the compulsory purchase we have made"? I do not see the reason of that. If I had to decide the question now for the first time, I should say that the company must take the land subject to the possibility that in ordinary events the owner of the property may deal with it or the proceeds of it by way of settlement, and if that increases the cost of payment out of Court, or of any order of the Court concerning the money, the persons who are most properly charged with those costs are the railway company and not the man who has dealt with his own property. For that I find a distinct authority in the case of *Re Lye's Estates* (1). It seems to me that the principle of that case is entitled, beside the authority of the judge (2) who decided it, to all possible respect. On the other hand I have been referred to certain cases in which a man has mortgaged his property, after the land had been taken, and the money paid into Court, and the Court has refused to give two sets of costs, viz., those of mortgagor and mortgagee. But it seems even there, there are decisions both ways. If I had to decide it myself, I should say again I do not see why the company ought not to pay the costs both of mortgagor and mortgagee. When they take a man's land compulsorily, they know there is always a chance of his dealing with it so as to increase the cost of getting the money paid out. I do not know why the compulsory action of the railway company should throw an increase of the costs on a man who did not part with his property willingly, but under the stress of the Act of Parliament. I therefore hold in this case that the costs in question must be paid by the railway company. I do not suppose they have been increased at all by the cost of ascertaining the construction of these instruments. Of course, if they have, that would be in the nature of adverse litigation, the costs of which the company would not have to pay.

Solicitors: *Chester & Co.*, agents for *Watson, Esam, & Barber, Sheffield; F. B. Moss*, agent for *Moss, Lowe & Co., Hull; Stoneham & Son.*

(1) 13 L. T. (N.S.) 664. (2) Vice-Chancellor *Stuart.*

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In re LIDIARD AND JACKSON'S AND BROADLEY'S CONTRACT.

[1889 L. 1230.]

Vendor and Purchaser—Title—Copyhold Land treated as Freehold for long Period of Time—Presumption of Enfranchisement—Evidence, whether rebutting Presumption—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 2 [*Revised Ed. Statutes, vol. vii., p.* 388].

Land anciently copyhold was for upwards of 100 years treated as freehold without any claim being made on the part of the lord of the manor, and the only intimation that the land was copyhold was in recitals to that effect and a covenant to surrender contained in deeds of recent date to which the lord was neither party nor privy. A contract having been entered into for sale of the land as freehold:—

Held, that, under the circumstances, an enfranchisement must be presumed, and that the purchaser was therefore not entitled to require the vendors to obtain the enfranchisement of the land.

Semble, also, the lord's right of entry was barred by the *Statute of Limitations*.

ADJOURNED SUMMONS under the *Vendor and Purchaser Act*, 1874.

On the 4th of December, 1888, *J. Lidiard* and *J. H. Jackson* entered into a contract in writing with *W. H. H. Broadley* for the sale to him of a mansion and estate in the parishes of *Welton* and *Elloughton*, in *Yorkshire*, for £11,000. In the contract it was stated that some of the land in the parish of *Welton*, believed to have been formerly copyhold, had been treated as freehold since the commencement of the title.

Upon the investigation of the title it appeared that in the recitals in a conveyance of the 31st of January, 1878, certain lands, comprising about twenty-two acres, were stated to be copyhold of the manor of *Howden*, and that in a deed of the 31st of December, 1883, there was a similar statement, and a covenant for the surrender of such lands. The purchaser accordingly required that the vendors should at their own cost obtain the enfranchisement of these lands.

Upon further investigation it appeared that out of the twenty-two acres in question 15A. 2R. were formerly allotted in lieu of

glebe and ancient inclosure, and that there was no reason to suppose that they were ever copyhold. As to the remaining 6A. 2R., it appeared that they were formerly copyhold, but had not been dealt with as such on the court rolls of the two manors since the year 1779; there was no evidence whatever on the court rolls of either of the manors of any proceedings for forfeiture or for recovery of heriots, fines or fees, after that date, nor was there any surrender or admission made in pursuance of the covenant to surrender contained in the deed of 1883. The last copyhold tenant had died in 1819.

There had been numerous subsequent devolutions of interest (including mortgages), but (with the exceptions already mentioned) the whole of the lands had been dealt with as freehold, and the title deduced accordingly.

It did not appear that the lords of either of the two manors were in any way parties or privy to the deeds of 1878 and 1883.

Under these circumstances the vendors insisted that a good freehold title was shewn, and that they were not bound to obtain the required enfranchisement, and this summons was taken out by the purchaser for the determination (*inter alia*) of that question.

Marten, Q.C., and *T. A. Nash*, for the purchaser:—

It is clear that part of the land sold as freehold is, in fact, copyhold, and the vendors are therefore bound to procure the enfranchisement of such land. The mere neglect by the lords of the manors to demand payment of fines is not a sufficient ground for presuming an enfranchisement: *Turner* v. *Guardians of West Bromwich Union* (1); and here any such presumption is precluded by the express statement in the deeds of 1878 and 1883 that part of the land is copyhold.

Renshaw, Q.C., and *T. L. Wilkinson*, for the vendors:—

A good title has been shewn, first, under the *Statutes of Limitations*, and secondly because an enfranchisement ought to be presumed. Upon the death of the copyhold tenant the right of the lord was to make proclamation and enter and seize *quousque*.

(1) 9 W. R. 155.

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The possession of any person who entered on the land was adverse to the lord, who could have brought ejectment. The lord's right, under 3 & 4 Will. 4, c. 27, s. 2, would be barred after twenty years, reduced to twelve by the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), s. 1. There is no express decision upon the point; but in *Doe* v. *Hellier* (1) Lord *Kenyon*, C.J., and *Buller*, J. (2), expressed the opinion that the old *Statute of Limitations*, 21 Jac. 1, c. 16, was applicable in a similar case, and in *Scriven* on Copyholds (3) it is said that the lord must bring ejectment within twenty (now twelve) years from the time when his right to issue the precept for seizure first accrued. *Lord Zouche* v. *Dalbiac* (4) is not an authority to the contrary; the question there was as to heriot custom, and the ground of decision was that seizure of a heriot was not an "entry" on land, nor such a heriot "rent" within 3 & 4 Will. 4; c. 27, ss. 1, 2.

[KAY, J., referred to *Whitton* v. *Peacock* (5), and *Walters* v. *Webb* (6).]

Those cases shew that the *Statute of Limitations* is applicable.

The land having been dealt with as freehold for more than a hundred years without any claim on behalf of the lord of either of the manors, the Court will presume enfranchisement. A difficulty, no doubt, arises by reason of the deeds of 1878 and 1883, but the lords were not parties or privies to those deeds, which were clearly framed as they were by mistake, and do not afford sufficient evidence to rebut the presumption which arises *aliunde*. *Turner* v. *Guardians of West Bromwich Union* (7) was a very special case: the land there in question had been used as a workhouse from 1717 to 1860, and, according to the report (which is not very explicit) was surrendered subject to a certain small composition to the lord, in lieu of fines and heriots, so long as it continued to be so used. In *Steward* v. *Bridger* (8) where a rent of eight shillings a year for copyhold of the manor of *Ipeing* had been paid for twenty-four years to the lord of

(1) 3 T. R. 162.
(2) Ibid. 172, 173.
(3) 6th Ed. p. 117.
(4) Law Rep. 10 Ex. 172.
(5) 3 My. & K. 325.
(6) Law Rep. 5 Ch. 531.
(7) 9 W. R. 155.
(8) 2 Vern. 516.

another manor, a grant of the freehold of the copyhold (*i.e.* an enfranchisement) from the lord of *Ipeing* was presumed, and in *Roe* v. *Ireland* (1) an enfranchisement was presumed even against the Crown.

Marten, in reply :—

Seizure by the lord *quousque* is not an entry within 3 & 4 Will 4, c. 27, s. 2: the statute refers to an unqualified entry. There is nothing now to prevent the homage making a presentment.

[KAY, J., referred to *Doe* v. *Trueman* (2).]

It is only necessary to make proclamation at three consecutive courts of the manor; there is no limit of time. There was no presentment or proclamation here, and *primâ facie* the lord's right never arose. *Lord Zouche* v. *Dalbiac* (3) is expressly in point. If under the custom of either of these manors the lord is entitled to a heriot, on the next occasion it becomes exigible he may seize.

The vendors produce, as part of their title, a deed containing a covenant for surrender of lands stated to be copyhold, and they cannot be heard to assert a different title.

KAY, J.:—

In this case it seems that a small portion of land which has been sold as freehold was originally copyhold. The last occasion on which it was dealt with on the court rolls was some time in the last century, in the year 1779, or thereabouts. The last copyhold tenant died, I am told, in 1819. The lord took no steps; some one entered upon the land and held it, and there have been several devolutions of title since that time, on no one of which has the lord taken any step. Moreover, there have been several deeds of mortgage in which the property has been treated as freehold and dealt with as such.

Now, the question which I have to determine, in effect is whether the lord can now insist on this being treated as copyhold land. The only remedy of the lord would have been by

(1) 11 East, 280. (2) 1 B. & Ad. 736.
(3) Law Rep. 10 Ex. 172.

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seizure *quousque*, and the only way in which he could have done that was by having proclamations made at three consecutive courts of the manor, and then entering and seizing upon the land until the proper tenant came in, after the death which took place in 1819. Those proceedings ought to have taken place, if at all, within a reasonable time after the death, and the lapse of seventy years from that time to this would make such an entry as that a very extraordinary proceeding. The question is—and it is a question upon which no direct authorities have been produced—whether such an entry as that is an entry such as is spoken of in the 2nd section of 3 & 4 Will 4, c. 27, an entry which under that Act could only be made within twenty years, and could only now under the later Act of 37 & 38 Vict. c. 57, be made within twelve years. In the absence of authority, I should think that it was. Copyholds are within the Act of Will 4, being expressly mentioned in the interpretation clause (sect. 1), and therefore an entry as to copyholds is one of the things which the Act says must be made within the twenty years. Therefore, if that point arises in this case, I should be inclined to hold that such an entry could not be made on land after the lapse of seventy years, but that the lord was bound long before that time had elapsed to make proclamation and seize *quousque* if he meant to do so at all.

But there is another point which is this. After so long a lapse of time as there has been in this case, the Court, as between the lord and any one against whom the lord made a claim, would presume that the estate had been enfranchised; and that presumption certainly, whether the *Statute of Limitations* applies or not, would entirely bar any right of the lord to treat the land as copyhold. The difficulty about that is this, that in two deeds, one in 1878 and the other in 1883, this land is stated to be copyhold, and the later of the two deeds treats it as copyhold because it contains a covenant to surrender. But the lord was not a party to either of those deeds. The deeds would be no estoppel between the persons who executed them and the lord of the manor. There could only be an estoppel between parties or privies, and the lord was neither party nor privy. Therefore, these deeds would not avail the lord save in so far as they might

be used as evidence to rebut the presumption of enfranchisement. But now I have got all the facts before me, and the question is whether the presumption is rebutted or not. It is plain from the evidence before me that never once since a date in the last century has this land been treated on the court rolls as copyhold of the manor. Therefore, it seems to me the true result of the evidence is that these deeds contain a mistake, and, as there is no estoppel—certainly none as between the vendors and the purchaser in any way, and none as between the vendors and the lord of the manor—it seems to me that I am at liberty to say that the presumption is not rebutted upon the whole by these recitals in these deeds; but to treat the recitals as being—as I make little doubt they in fact were—a complete mistake. Upon the whole, therefore, I think this property may now be deemed freehold, and that the purchaser has a good title.

Solicitors for the Applicant: *Robert Jenkins*, agent for *Thompson, Cook & Babington, Hull.*

Solicitors for the Respondents: *Lidiard & Co.*

C. C. M. D.

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July 10, 11.

In re READ & GRESWELL'S DESIGN.

Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 58, 60, 90—*Designs Rules*, 1883—*Different Classes.*

Where a design has been registered in one or more of the classes of goods specified in Schedule 3 to the Designs Rules, 1883, for a particular article of a certain material, a similar design cannot be registered by another person in another class for a similar article made of a different material, as not being new and original within the meaning of the *Patents, Designs, and Trade Marks Act*, 1883, s. 47.

THIS was an application by Miss *J. Taylor* under sect. 90 of the *Patents, Designs, and Trade Marks Act*, 1883, that the entry of a design registered by Messrs. *Read & Greswell* might be expunged from the register.

On the 8th of January, 1886, the Applicant registered a design in Class v. in Schedule 3 of the Designs Rules, 1883, viz. "articles composed wholly or partly of paper (except hangings)," for the pattern and shape of a flower candle shade in imitation of a chrysanthemum, and had since the date of registration been selling candle shades made according to the design.

On the 30th of November, 1886, the Respondents, Messrs. *Read & Greswell*, registered in Class XII. of the above schedule, viz. "goods not included in other classes," a design for a candle shade, consisting of an imitation chrysanthemum, and had since been selling candle shades made according to that design of rag and paper combined, and similar to those made and sold by the Applicant.

The Court upon the evidence was of opinion that the two designs were substantially identical, and that the Applicant was a person aggrieved within sect. 90 of the Act, and the only question calling for a report was whether, having regard to the prior registration of the Applicant's design in Class v., the Respondents could register their design in Class XII., that being for a different class of goods.

Morton Daniel, for the Applicant:—

The Respondents' design was not new and original at the date

of registration as required by sect. 47. To be new or original a design must be "either substantially novel or substantially original, having regard to the nature and character of the subject-matter to which it is to be applied:" *Le May* v. *Welch* (1); and the nature of both these designs is a chrysanthemum, and the subject-matter a candle shade. No doubt sect. 58 limits copyright in a design to articles comprised in the class in which it is registered, but the Legislature never could have intended that a design registered in one class might be imitated in goods in another.

George White, for the Respondents:—

Our design is new and original so far as such a design can be. The Applicant has no rights in her design outside the class in which it is registered.

[He referred to *Edwards* v. *Dennis* (2); *In re Lyndon's Trade Mark* (3); *Jay* v. *Ladler* (4).]

Morton Daniel, in reply.

CHITTY, J.:—

The Applicant's design is registered in Class V., which is for articles composed wholly or partially of paper, except hangings, which are included in another class. The Respondents' design is registered in Class XII., which is for goods not included in the other classes, and it is argued on their behalf that although their design may not by itself be new and original, yet that it is so within the meaning of sect. 47 of the Act. That argument comes to this, that where a new and original design is registered in one class, a rival designer is at liberty to take the design and transfer it bodily to another class, and register it in that class, or, if it be on the register, may maintain it there. I do not think this argument can be sustained. No doubt the copyright in a design conferred by sect. 60 of the Act is limited to the goods in the class or classes in which the design is registered, and this is clearly the case, for under

(1) 28 Ch. D. 24, 35.
(2) 30 Ch. D. 454.
(3) 32 Ch. D. 109.
(4) 40 Ch. D. 649.

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sect. 58, which gives a special remedy by penalty for the infringement of a registered design, the registered proprietor cannot proceed against the infringer in respect of goods outside the class in which the design is registered, and for this reason, that the person registering having knowingly confined the registration to one class of goods, has by so doing impliedly given notice to all the world that they are at liberty to use the design for goods not included in the class or classes, for a person may register a design in more than one class. It is on this that the Respondents' argument is based. But can the Legislature have had this intention?

I suggested the case of a design registered for jewellery, and another trader finding this to be so, and that articles marked with such design were being put on the market, and people were becoming generally acquainted with the design, taking this design and registering it in some other class of goods, such as glass (Class IV.) or lace (Class IX.), a thing which in the case of many designs might easily be done. I am satisfied that it was not the intention of the Legislature to allow this to be done. The answer to the argument is to be found really in sect. 47 of the Act, where the words used are: "Any new or original design not previously published in the *United Kingdom*." To be capable of being registered a design must be "new or original" in fact, and not, as is suggested, "new or original" as to some particular class of goods. It cannot be said to be new and original if it is already being applied to articles of an analogous character.

This application must therefore be granted, and with costs.

Solicitors: *Reader & Hicks*; *Tyrrell Lewis & Co.*

G. M.

CARRITT *v.* REAL AND PERSONAL ADVANCE COMPANY.

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May 29; *June* 4.

[1888 C. 4738.]

Equitable Mortgagee—Conflicting Equities—Priority—Negligence—Custody of Title Deeds—Trustee and Cestui que trust.

The Plaintiff purchased an equity of redemption in leaseholds, and for his own convenience took the assignment in the name of *C.* as trustee, who executed a declaration of trust in favour of the Plaintiff. *C.* fraudulently borrowed money of the Defendants, representing himself as the absolute owner, executed an equitable charge by demise of the equity of redemption to the Defendants, deposited with them the deed of assignment, and absconded. *C.* was a confidential clerk, whose duty it was to put away in the safe the Plaintiff's securities. In an action by the Plaintiff for a declaration that the Defendants had no interest or claim in the leaseholds, and for delivery up of the deed of assignment:—

Held, that the fact that the Plaintiff had under the circumstances allowed *C.* to have the custody of the deed of assignment was not negligence sufficient to deprive him of the benefit of his prior equitable title.

The ordinary recitals and forms commonly used in conveyances and assignments to trustees with a view of keeping all notice of the trust off the title, are not misrepresentations on the face of the document which will displace the equitable title of a *cestui que trust*, even though they may have been fraudulently made use of by a dishonest trustee to shew that he was in fact the absolute owner.

Shropshire Union Railways and Canal Company v. *Reg.* (1) discussed.

By an indenture of lease, dated the 23rd of January, 1880, and made between *Batty* of the one part and *Scoley* of the other part, a certain messuage and premises were demised to *Scoley* for the term of ninety-seven and a half years, from the 25th of December, 1879, at the rent and subject to the covenants and conditions therein contained.

By an indenture of mortgage dated the 23rd of August, 1880, and made between *Scoley* of the one part and *Carter* of the other part, the said messuage and premises were demised to *Carter* for the residue of the term (except the last day thereof), subject to a provision for redemption on payment by *Scoley* to *Carter* of the principal sum of £500 and interest as therein mentioned.

On the 2nd of April, 1881, *Scoley* executed a further charge

(1) Law Rep. 7 H. L. 496.

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on the premises in favour of *Carter* for securing a further advance of £50.

By an indenture dated the 24th of February, 1886, and made between *Scoley* of the one part and *Chuck* of the other part, after reciting the above-mentioned lease, mortgage, and further charge, and that the principal sums thereby secured were still owing, but that all interest had been paid, and that *Scoley* had agreed with *Chuck* for the sale to him of the said premises, subject to the mortgage and further charge and the principal moneys and interest thereby secured, at the price of £134, it was witnessed that in pursuance of the assignment and in consideration of the sum of £134 paid by *Chuck* to *Scoley* (the receipt of which sum *Scoley* thereby acknowledged), *Scoley* as beneficial owner conveyed the premises to *Chuck*, to hold the same to *Chuck* for the residue of the term of years created by the above lease, at the rent and subject to the covenants by and in the lease reserved and contained, and to the said mortgage and further charge, and the £550 and interest thereby secured. And the indenture contained a covenant by *Chuck* to pay the rent reserved by the lease of the 23rd of January, 1880, and observe and perform the covenants and conditions therein contained, and to keep *Scoley* indemnified against all claims and demands on account thereof.

The assignment by *Scoley* to *Chuck* was made to him solely as trustee for *Frederick Carritt* and the Plaintiff, who were then in partnership as solicitors, and who paid the whole of the consideration which was paid to *Scoley* in respect of such assignment. It was the fact, however, that no money passed, but Messrs. *Carritt*, having a claim against *Scoley*, it had been arranged that *Scoley* should convey the equity of redemption in the property in consideration of the release of that claim.

By an agreement dated the 29th of April, 1886, and made between *Chuck* of the one part and *Frederick Carritt* and the Plaintiff of the other part, *Chuck* agreed that he would assign or dispose of the premises as *Frederick Carritt* and the Plaintiff should from time to time direct, and that in the meantime the premises, subject to the said incumbrances, should be held by *Chuck* in trust only for *Frederick Carritt* and the Plaintiff.

In the month of March, 1887, *Chuck* applied to the Defendants

for a loan of £50 upon the security of the equity of redemption in the above premises, and represented to them that he was the owner of the house, subject to a mortgage for £550. The Defendants, relying upon his representations and the fact of the assignment of the 24th of February, 1886, being in his possession, advanced him the sum of £50, which was secured to them by an equitable charge by demise of the equity of redemption in the premises for the whole term less one day, dated the 30th of March, 1887, and by a promissory note. At the time of the execution of the mortgage *Chuck* deposited with the Defendants the assignment of the 24th of February, 1886. He afterwards absconded.

The Plaintiff by his statement of claim alleged that he and *Frederick Carritt* retained the assignment of the 24th of February, 1886, till the same was wrongfully and feloniously abstracted from their custody by *Chuck*, and that the abstraction was not discovered by the Plaintiff and his partner, or either of them, till after *Chuck* had delivered the assignment to the Defendants; that in April, 1887, *Frederick Carritt* retired from the partnership, and thereupon all his interest in the premises vested in the Plaintiff, who continued to act as *Carter's* solicitor; and further, that *Chuck* entered into the transaction with the Defendants fraudulently, and in breach of his trust, and that the Defendants took no assignment of the premises, nor any written document conveying to them any interest therein, and neglected to make proper inquiries, or investigate the title before making the advance. It appeared, however, that the Defendants besides their equitable charge took a statutory declaration from *Chuck* that he had not charged or surrendered his interest in the property.

The Plaintiff claimed a declaration that the Defendants had no interest or claim on the premises, and delivery up of all documents relating thereto.

Witnesses were examined on both sides, but the evidence went chiefly to the question of negligence as to the custody of the deed of the 24th of February, 1886.

Latham, Q.C., and *John Simmonds*, for the Plaintiff:—

The Plaintiff is entitled to priority. As between equitable

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titles priority of date will, in the absence of other circumstances, give priority of right. The assignment was taken in the name of *Chuck*, as a trustee for the Messrs. *Carritt*, as it was not convenient for them to take the deed in their own name. *Chuck*, as a trustee, had a right to the custody of the deed. In order to deprive us of the priority due to the earlier date of our assignment the Defendants must shew negligence, and that they have failed to do. The mere fact that the Defendants have obtained the deed is not sufficient to give them priority.

[They referred to *Farrand* v. *Yorkshire Banking Company* (1); *Cory* v. *Eyre* (2); *Shropshire Union Railways and Canal Company* v. *Reg.* (3); *In re Vernon, Ewens, & Co.* (4).]

Romer, Q.C., and *Eustace Smith*, for the Defendants:—

There has been negligence on the part of the Plaintiff sufficient to deprive him of any right of priority that he might otherwise have had from his charge being prior in date to ours. Had the Plaintiff used ordinary care and kept the deed of February, 1886, in his own possession this fraud could never have been perpetrated: this is gross negligence sufficient to deprive him of any priority: *Northern Counties of England Fire Insurance Company* v. *Whipp* (5). In the absence of any circumstances to cause suspicion, we are entitled to rely on the fact that *Chuck* appeared on the face of the deed of February, 1886, to be the absolute owner of the equity of redemption on which we advanced the money: *Bickerton* v. *Walker* (6); *Rice* v. *Rice* (7). The Plaintiff chose to take this assignment in the name of his clerk, as trustee for him, for his own convenience, and never took any trouble to see that he made no fraudulent use of this assignment. On these grounds he is not entitled to any priority.

Latham, in reply:—

There is no "gross negligence" here that amounts to evidence of "fraudulent intention," so as to bring the Plaintiff's conduct within the decision of *Northern Counties of England Fire Insurance*

(1) 40 Ch. D. 182.
(2) 1 D. J. & S. 149.
(3) Law Rep. 7 H. L. 496.
(4) 33 Ch. D. 402.
(5) 26 Ch. D. 482.
(6) 31 Ch. D. 151.
(7) 2 Drew. 73.

Company v. *Whipp* (1). The trustee *Chuck* was the proper person to keep this deed; it is not like the negligence of a mortgagee leaving the *indicia* of title with his mortgagor. Our negligence, if negligence it was, was not the preponderate cause of the loss; we are, therefore, entitled to recover: *Bank of Ireland* v. *Trustees of Evans' Charities* (2); *Mayor, &c., of Merchants of the Staple of England* v. *Bank of England* (3); *Vagliano* v. *Bank of England* (4). If the Court is satisfied as to our priority the Defendants cannot retain the deed, though they did get it without notice: *Newton* v. *Newton* (5). We say further that the Defendants have been guilty of negligence; they never called for any abstract; had they done so, they might have discovered that the property was not really *Chuck's*; they cannot, therefore, claim the benefit of being purchasers for value without notice: *In re Morgan* (6).

Romer, in reply, on fresh authorities cited:—

There was no necessity here for any trustee; it was a mere matter of convenience to the Plaintiff: then there is an absolute misstatement on the face of the document, on the faith of which we acted. The deed recites that "*Scoley* has agreed with *Chuck* for the sale to him," &c., and also that this sale was in consideration of £134 paid, whereas in fact no money was paid, and the sale was not to *Chuck* but to the Plaintiff. This brings the case within Lord *Cairns'* remarks in *Shropshire Union Railways and Canal Company* v. *Reg.* (7). *Chuck* was merely the agent of the Plaintiff, not his trustee in the proper sense of that term, and the Plaintiff as his principal ought to suffer for his fraud: *Hunter* v. *Walters* (8).

Latham replied.

CHITTY, J.:—

The question is one of priority arising between the Plaintiff and the Defendants, each of whom has only an equitable title so

(1) 26 Ch. D. 482.
(2) 5 H. L. C. 389.
(3) 21 Q. B. D. 160.
(4) 22 Q. B. D. 103.
(5) Law Rep. 4 Ch. 143.
(6) 18 Ch. D. 93, 102.
(7) Law Rep. 7 H. L. 496, 509.
(8) Ibid. 7 Ch. 75, 85.

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far as any question falls to be decided by me. The Plaintiff alleges, and rightly, that he is first in point of time. The Defendants, who come second, say that in the circumstances of the case priority ought to be ascribed to them.

The property dealt with is leasehold, demised for an ordinary building term; and the legal estate is outstanding in a mortgagee, that mortgage having been created by a demise for the residue of the original term except the last day. Subject to that demise, the original term remains vested in *Chuck*.

The Plaintiff's title stands thus: Messrs. *Carritt* (a firm of solicitors, of whom the Plaintiff Mr. *Carritt* is now the representative, the partnership having been dissolved) had a claim against *Scoley*, and it was arranged that *Scoley* should convey the equity of redemption in the property that I have mentioned in consideration of the release of that claim. It was considered "not convenient" by Messrs. *Carritt* to take the deed in their own name; but having a confidential clerk named *Chuck*, they proposed to take the deed in his name as trustee for them. The transaction assumed the form (and there is nothing in the evidence to shew that the form does not correctly represent the true transaction) of a sale of the equity of redemption at the price of the amount of the claim. The deed of assignment, which is in the common form, is an assignment by *Scoley* to *Chuck*. Some little time after, *Chuck* executed a declaration of trust in favour of Messrs. *Carritt*, the trust not appearing in any way on the face of the assignment. Subsequently *Chuck*, being in possession of the deed of assignment, went to the Defendants and borrowed money from them, giving them an equitable charge by demise for the original term less the last day. He acted ostensibly (but fraudulently) as if he were the owner of the property, subject only to the mortgage. The Defendants did not investigate the title. If they had investigated the title, and *Chuck* had acted honestly, there would have appeared on the abstract the declaration that *Chuck* had executed in favour of Messrs. *Carritt*. *Chuck* made a statutory declaration, in which he stated that he had not charged or incumbered "his interest" in the equity of redemption. Except by not having investigated the title, it is clear that the Defendants took all reasonable precautions. They were satisfied *Chuck*

was a respectable man, and they did not inquire of those in whose employment he was, Messrs. *Carritt*, nor were they bound to do so. *Chuck* was introduced to them by a person they knew; they had no reason to suspect *Chuck's* honesty; and they accordingly advanced him the money, making the loan he asked for, and took from him a deed which created only an equitable interest in them, and at the same time took from him the deed of assignment which had been executed by *Scoley*.

Now there was evidence in regard to the custody of the assignment itself; the result is, in my opinion, that Messrs. *Carritt* did not establish that the deed of assignment was ever placed in either one of their safes. The Plaintiff said, and said truly, that it was the duty of *Chuck* to put the deed of assignment, as well as the declaration of trust, in one of their safes; but Mr. *Carritt*, who gave his evidence very fairly, was unable to shew that the deeds, or either of them, had ever been in their custody in that sense. I must take it as a fact that they allowed *Chuck*, in whom they had the greatest confidence, to remain in possession of the deed, and they took no precautions with reference to the declaration of trust, although their not keeping the declaration of trust away from the hands of *Chuck* is an immaterial fact in the case. The point made for the Defendants is that the Plaintiff allowed *Chuck* to have possession of the deed of assignment.

Now the case, therefore, as between the Plaintiff and the Defendants, is this: the Defendants claim through a trustee for the Plaintiff. The law allows a man for convenience, being the absolute owner, to take a conveyance of land, or a transfer of stock, or an assignment of a lease, or indeed any other property, instead of to himself, to a trustee to hold for him; and though it may not be prudent to allow the *indicia* of title—the title-deed, the stock certificate, or the like, to remain with the trustee, yet it is clear law that the deeds, or certificates of title, or other the *indicia* of title, are lawfully and rightfully in the custody of the trustee. I say it is not altogether prudent for the equitable owner to leave the deed in the hands of his trustee. because in many cases the trustee has the legal estate also; and taking the case, for instance, of stock, he can make a perfect assignment of stock to a purchaser for value, who takes it without any notice,

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and thereby obtains a good title as against the equitable owner, for whom the transferor held the stock merely as trustee. But the *cestui que trust*, the absolute equitable owner, has at least some safeguard in a case of that kind if he keeps the certificate in his own possession, because the trustee then has a greater difficulty in procuring the transfer to be registered in the books of the company. Still I go back to the proposition that there is no negligence on the part of a *cestui que trust* in allowing all the instruments of title to remain in the custody of the trustee.

Then I come to the law of the case, and it appears to me that this case is covered by the decision of the House of Lords in the case of *Shropshire Union Railways and Canal Company* v. *Reg.* (1). After having carefully read the speeches delivered to the House on that occasion, I take this proposition from Lord *Cairns'* address, which appears to give the ground upon which the House of Lords decided. He says (2): "The present appears to me to be simply the case of an ordinary trustee holding property of the kind in question for a *cestui que trust*, and an incumbrance created by the trustee, which can only carry to that fresh incumbrancer such interest as the trustee could give. The trustee could not give an interest as against his *cestui que trust*, and therefore it appears to me that the incumbrancer now represented by the plaintiff in the mandamus, is not entitled to have the transfer in the company's books of the stock in question." In his address Lord *Cairns* deals with the proposition, upon which I have heard considerable argument at the bar, whereby it was sought to establish a difference between the case of a trustee holding for a married woman, children, or the like, and the case where, for the mere purpose of convenience, the absolute owner procures a person to act, and simply creates the trust for the purpose of his own convenience (3); and that distinction, Lord *Cairns* holds, cannot be maintained. He had the case before him of the absolute owners having put the stock into the name of the trustee. It is true that in that case Lord *Cairns* says, on the facts, that the persons who had created the trust, being a corporation, could not hold in their own name; but when his

(1) Law Rep. 7 H. L. 496. (2) Law Rep. 7 H. L. 510.
(3) Law Rep. 7 H. L. 507.

address is considered from beginning to end, it will be seen that no distinction on that ground can be relied upon. The result is, so far as I have gone, that the fraudulent act of *Chuck* has not displaced the equitable title of the Plaintiff.

Towards the close of the argument Mr. *Romer* (who has been doing all he can by way of argument and suggestion for his clients) brought forward a new point which had escaped attention up to that time. Lord *Cairns* in the same speech says (1): "The case would be entirely different if any misstatement had been made by the directors, if anything had been said by them to Mr. *Robson*, or if any thing had been placed by them on the face of any document stating something which was not the truth, upon the faith of which Mr. *Robson* might have acted. That was the question which came before the Court in the case of *Rice* v. *Rice* (2), referred to at your Lordships' bar, and which appears to have been an authority acted upon by the Court of Exchequer Chamber," and then he distinguishes that case from the case he was dealing with. Then in order to bring the Defendants' case here within the scope of that proposition, Mr. *Romer* argued that there was on the face of the deed of assignment to *Chuck* a misstatement. I will deal with that proposition in a moment, but I must make this observation: that when the Defendants' witnesses were in the box, no questions directed to the alleged misstatement were put to them, and there is no evidence that they acted on the faith of the statement which Mr. *Romer* says is the misstatement of fact. They acted on the faith of the deed generally; but there was no specific evidence adduced to shew that they acted on the particular part of the deed which I am about to read. Now the deed contains this recital, which is common form among conveyancers, and is the regular recital which would appear on a purchase deed where a purchase is being taken by a trustee, and the trust is not being disclosed on the face of the instrument, "Whereas *Scoley* has agreed with *Chuck* for the sale to him of the property, subject to the mortgage, at the price of £134." It was said that that was a misrepresentation of fact. But taking the deed as it stands, as I am bound to do, although I know, having regard to the evidence, that it was the

(1) Law Rep. 7 H. L. 509. (2) 2 Drew. 73.

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solicitors who themselves were the purchasers, yet it was competent for *Chuck* and for them also to agree that *Chuck* should come forward and take the conveyance in his own name upon a recital that he, *Chuck*, was the purchaser. Of course as between the parties to the deed, as I need hardly observe, *Chuck* and *Scoley* are both bound by the statement, *Scoley* could not escape in any way from the deed by shewing that instead of *Chuck* being the purchaser Messrs. *Carritt* were. The result therefore is; that by putting this recital in their deed *Scoley* and *Chuck* agreed to stand and did stand in the position of vendor and purchaser. There is also the statement that *Chuck* had paid the money. It is true that no money had actually passed. Instead of any debt or demand which the solicitors had against *Scoley* being first liquidated in money, and then the money being paid back again, in substance the transaction was moulded, as the parties were entitled to mould it, into the form of a sale. As *Chuck* was made to appear, and did agree himself to appear, as the purchaser, so it was competent to the parties to arrange that *Chuck* should appear to be the person who paid the money.

The difficulty I really feel about this part of the case is the danger of doing anything which may imperil what has been going on for centuries among conveyancers. Conveyancers have not always stated exactly the truth upon the face of their deeds. No doubt at the present day greater care is taken, but there are some forms which are known, and which are in common use. If trustees are lending money on mortgage the trustees do not disclose their trust on the face of the deed, and there are forms used which are probably, when investigated as they stand at the present day, free from objection. The recital runs or the deed in substance shews that the money is the money of the trustees belonging to them upon a joint account, and so it is in law, and they may be trustees simply for one equitable owner or for several. If the whole transaction were disclosed there would be a statement to the effect that they were trustees of the money for some other person or persons; but the practice of conveyancers and the convenience of dealing with real property is the justification for keeping the trusts off the face of the deed. The object of the deed I am dealing with was not to disclose on the face of

it the nature of the trust. It appears to me I am not at liberty to say at this day that where purchasers are dealing with real estate or leasehold estate, they are not entitled to frame their deed (so long as they do not make any direct misrepresentation on the face of it) according to the ordinary forms used by conveyancers and according to those forms which disclose part only of the transaction. The deed is in fact in the common form in use where a purchase is made in the name of a trustee by one or more equitable owners. That being so, I am unable to find that the statements which appear upon this deed are misrepresentations of the kind to which Lord *Cairns* was referring.

The result therefore, is, that the Defendants have not succeeded in displacing the priority which the Plaintiff has by reason of his having obtained the first declaration of trust. I consider myself, as I have said, bound to arrive at this conclusion by the general law of trusts as applied in the decision of the House of Lords, and in two other cases which were referred to, but which I need not stay now to mention at length. I must give judgment in favour of the Plaintiff.

Solicitors: *Carritt & Son; Nye, Greenwood & Moreton.*

G. M.

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BURLAND *v.* BROXBURN OIL COMPANY.
In re BURLAND'S TRADE-MARK.

[1889 B. 1541.]

Trade-mark—Fancy Word—"Distinctive"—"Common to the Trade"—Rectification—Note on Register—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (1) (*c*), and (2), 74 (1) (*b*) (2) (3), 90.

The words "any distinctive word" in sect. 74 (1) (*b*) relate back to the words "Distinctive . . . . or fancy word not in common use" in sect. 64 (1) (*c*), and the word "distinctive" in the latter section must be construed as applying to all the words that follow it. "Distinctive" in sect. 74 (1) (*b*) means "*primâ facie* distinctive," so that any word which, though *primâ facie* distinctive, is in reality common to the trade must be disclaimed when registered as part of a combination.

The words "common to the trade" in sect. 74 (1) (*b*) must be interpreted in their ordinary grammatical sense as equivalent to "open to the trade," and are not limited or defined by the explanation in sect. 74 (3) as "publicly used by more than three persons."

THE Plaintiff, *Frederick Adolph Burland*, trading as *F. A. Burland & Co.*, at *Crowle, Lincolnshire*, had in August, 1888, registered as a new trade-mark (No. 77,935) under the *Patents, Designs, and Trade Marks Act*, 1883, a label, to be put round the bottles in which his laundry preparations were sold, consisting of the following particulars:—First, The word "*Washerine*," in large and conspicuous capital letters, at the top, middle, and bottom of the label, and again some seven times in smaller letters; secondly, the written signature of the firm, "*F. A. Burland & Co.*;" and thirdly, a quantity of printed matter, part of which was laudatory of "*Washerine*," and part of which consisted of directions for use. The Plaintiff subsequently advertised this preparation on printed hand-bills, having in large letters across them "*Washerine.* Registered trade-mark, No. 77,935." The Defendant company, whose registered office was in *Glasgow*, but who had branch offices in *London, Manchester*, and *Newcastle*, also manufactured and sold a preparation for laundry purposes which they advertised as "*Washerine.*"

On the 10th of April, 1889, the Plaintiff commenced the

present action against the Defendant company, claiming an injunction to restrain the Defendants from infringing the Plaintiff's registered trade-mark by using the word "*Washerine*," and also to restrain them from using the word "*Washerine*" upon, or in connection with, any preparation for laundry purposes not manufactured by the Plaintiff, and from passing off, or enabling others to pass off, any laundry preparations not of the manufacture of the Plaintiff as the goods of the Plaintiff.

The Plaintiff moved for an interim injunction in the terms of his claim, and the Defendants made a counter-motion under the *Patents, Designs, and Trade Marks Act*, 1883, that the register of trade-marks might be rectified by expunging the word "*Washerine*" from the mark No. 77,935, or, in the alternative, for the entry of a disclaimer of any exclusive right to the use of such word, or for such other rectification of the register as should seem just.

The Plaintiff's motion was heard before Mr. Justice *Chitty* on the 28th of June, 1889, and dismissed on the ground that the word "*Washerine*" was descriptive only, and not a fancy word capable of registration within sect. 64 of the *Patents, Designs, and Trade Marks Act*, 1883. This decision calls for no report. There was evidence, and the Court held it proved, that the Plaintiff, when he registered this label as his trade-mark, considered and intended the word "*Washerine*" to be a distinctive word and the chief characteristic of his trade-mark.

The Defendants' motion for rectification now came on for argument.

Romer, Q.C., and *E. Carpmael*, for the motion :—

The Court has already decided that "*Washerine*" is not a "fancy" word; we say it is not "distinctive," but merely descriptive, and we ask for an order under sect. 90 of the *Patents, Designs, and Trade Marks Act*, 1883, that it may be expunged from the register, or under sect. 74 (2) for an entry disclaiming the right to the exclusive use of this word.

[CHITTY, J., referred to *Thompson* v. *Montgomery* (1).]

(1) 41 Ch. D. 35.

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"Distinctive" in sect. 74 (1) (*b*) cannot be construed in its strict sense as significant of exclusive use; what was intended appears to be, that any mark which is *primâ facie* distinctive, but which is really common to the trade, must be disclaimed when registered as part of a combination: *Sebastian* on Trade-Marks (1). "Distinctive" in this and in sect. 64, sub-sect. (1) (*c*), must be taken as applying to all the words that follow: *In re Van Duzer's Trade-mark* (2). The word, too, is "common to the trade" in the sense that its use is open to all the trade. A similar order to the one we now ask was made in *Humphries* v. *Taylor Drug Company* (3). That the Court has power to order a disclaimer under the Act of 1883 appears clear from the *dicta* of Lord Justice *Cotton* in *In re Hudson's Trade-marks* (4), and *In re Atkins' Trade-mark* (5).

[They also referred to *In re Kuhn & Co.'s Trade-marks* (6), and to sects. 10 and 16 of the *Patents, Designs, and Trade Marks Act*, 1888, which repeal and re-enact, with a variation in language, sects. 64 and 74 of the *Patents, Designs, and Trade Marks Act*, 1883.]

Byrne, Q.C., and *John Cutler*, for the Respondent, the Plaintiff:—

Under sect. 64, sub-sect. (1) (*b*), the written signature of the firm constitutes a perfectly good trade-mark: under sect. 64, sub-sect. (2), there may be added to this any letters or combination of letters, words, or figures; the Court having decided that "*Washerine*" is not distinctive, we shall not be able any longer to assert that it forms an essential part of this trade-mark, and we ought to be allowed to retain on the register what has now been decided to be a perfectly innocuous word. The case is not within any of the sections of the Act of 1883 relied on in support of this motion. The fact that this word remains on the register will not affect the Defendants' rights: *In re Horsburgh & Co.'s Application* (7). The proviso in sect. 74, sub-sect. (2), as to

(1) Page 316, note (*b*), 2nd ed.
(2) 34 Ch. D. 623.
(3) W. N. (1888) p. 214.
(4) 3 Rep. Pat. Cas. 155, 162.
(5) Ibid. 165.
(6) 53 L. J. (Ch.) 238.
(7) 53 L. J. (Ch.) 237.

a disclaimer of the right to the exclusive use of such "common particular" cannot apply to such a word as "*Washerine*," inasmuch as it is not a word in common use, and therefore not "common to the trade." This section only applies where there are words and figures or other marks common to the trade: *Thompson* v. *Montgomery*, per Lord Justice *Lindley* (1). Nothing can be common to the trade which is used only by one person, or at the outside by two, as this word was. Common to the trade must mean in common use by the trade at the time of registration, that is, publicly used by more than three persons on the same or similar description of goods, according to the definition in sect. 74, sub-sect. 3.

Romer, in reply.

CHITTY, J. (after stating the nature of the present application, the result of the Plaintiff's motion, and describing the Plaintiff's trade-mark as originally registered), continued:—

Now I have to consider the 64th section and the 74th section of the Act of 1883. I observe that both these sections have been repealed and new sections substituted for them by the Act of 1888. I am not at liberty to interpret the Act of 1883 by the Act of 1888 because the Act of 1888 comes after the Act of 1883, and because the language of new sections—viz., 10 and 16 of the Act of 1888, when compared with sects. 64 and 74 of the Act of 1883, varies, and I am not able judicially to say to what extent the Legislature was only making a variation in its language, and to what extent it was making substantially a new enactment. I refer to those two new sections, 10 and 16, merely for the purpose of saying that much that is obscure on the sections as they stood in the Act of 1883 has been now made clear, and that the substitution of the new enactments is to distinguish the essentials from the non-essentials where anything that is a trade-mark is registered, and to compel the person who seeks for registration to distinguish upon the face of the register itself that which is essential and that which is not. Now, undoubtedly, the Respondent has a good trade-mark with reference to the written

(1) 41 Ch. D. 49.

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signature of the firm, and he says that he is entitled to register with that, without any disclaimer, the term "*Washerine*," as being a mere simple addition to the trade-mark, and a word in respect of which he can claim no rights. Without going through the arguments at length I will take the 74th section, which runs thus: "Nothing in this Act shall be construed to prevent the Comptroller entering on the register . . . as an addition to any trade-mark;" then come two sub-sections. It is not clear on the face of this Act, looking at the words "as an addition to any trade-mark," whether that which is registered, is registered as part of the trade-mark, or is registered as an addition to the trade-mark; the language as it stands would appear, until I read what comes afterwards, to denote that it is an addition to the trade-mark and not a part of the trade-mark itself. It is clear from some portions of the subsequent part of this section, that something which can be registered as an addition to the trade-mark, is not part of the trade-mark, because sub-sect. 2 of this section contains a provision for a disclaimer of some of this additional matter, and if on the face of the register the person registering disclaims a part of the addition, it is plain that that part of the addition so disclaimed is not part of the trade-mark. Now the two sub-sections are (*a*) and (*b*), and I may, for the purposes of this case, lay aside the sub-sect. (*a*), because that relates to a trade-mark used before the 13th of August, 1875, and this trade-mark was not used before that date. Sub-sect. (*b*) runs thus: "In the case of an application for registration of a trade-mark not used before" the date I have mentioned, "any distinctive word or combination of words, though the same is common to the trade," that is to say, nothing in the Act shall preclude the Comptroller from entering on the register as an addition to any trade-mark any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which his application is made. Now, staying there for one moment, the term "distinctive," as has been pointed out by Mr. *Sebastian*, is not consistent with the rest of the section, because, if the word is common to the trade, it is not distinctive. Therefore I take it it means any word which is *primâ facie* distinctive, or which otherwise might be distinctive. Of course

directly it is really found to be common to the trade it ceases to be distinctive; but I think the meaning of it must be a word which is *primâ facie* distinctive.

In the case before me the word "*Washerine*" clearly was inserted on the register, as is shewn by the evidence, as a distinctive word, and I take it that this part of the enactment, "any distinctive word," relates back to the 64th section, where the term "fancy word or words not in common use" occur, and, as I read that section—and in conformity with what I understand to be Lord Justice *Cotton's* opinion upon it—the word "distinctive" runs through the whole of the sub-sect. (*c*), so that the latter portion of that sub-section in effect stands "a distinctive fancy word or words not in common use." The same sect. 64 in sub-sect. (3) uses other phraseology, namely, "any special and distinctive word." I think, therefore, that the phrase "any distinctive word" in sub-sect. (1) (*b*) of the 74th section has a reference to the language of the 64th section; but it now appears—and it is made part of the argument for the Respondent—that, in the result, though the Respondent considered that the word "*Washerine*" was a distinctive word, it is not.

Then I have to ascertain what is the meaning of the phrase "common to the trade," and the Respondent's argument is that those words are not used in their grammatical signification, but that they mean in common use in the trade, and his object in asking me to vary the language of the Legislature in that sub-section is apparent, because then he thinks he can escape from sub-sect. (2) of the 74th section, which requires him to enter a disclaimer where there is any such common particular or particulars to be found on the register or proposed to be entered on the register. He was bound to disclaim any right to the exclusive use of the same. The argument in support of the interpretation of the words "common to the trade" as being equivalent to "commonly used in the trade," is founded on the third proviso of this 74th section, the substance of which is that "any device, word," and so forth, publicly used before the date mentioned in 1875, "by more than three persons on the same or a similar description of goods shall, for the purposes of this section, be deemed common to the trade in such goods." But that is no

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definition nor explanation of the term "common to the trade," except an explanation to the limited extent which I am about to mention. It might have been a question whether user by three or four, or five or six persons would have made a word or combination of words common to the trade, and the proviso is introduced merely for the purpose of settling that question, which might have been a difficult one of fact, and saying that where you have user in the trade by more than three persons, then the name so used shall be deemed to be common to the trade. But that is only a particular case, and it has not the effect of defining the meaning of the term.

Now the Applicant's contention is that common to the trade means, that which is open to the trade to use, substituting another phrase in order to bring out exactly the meaning which the Applicant contended ought to be placed upon the word, and in support of his contention he puts this case. Supposing that there is some word which has been used by the trade largely, some ten years or so, or by twenty or thirty persons before the application for registration under this Act of 1883, but for certain reasons all those persons except two have dropped the user; any of the others may have recourse to the user again at any time; but, says the Applicant, if the term "common to the trade" is confined to user, it must mean user at the time of the application. That was (I put the question specially to Mr. *Byrne*) also the contention on the part of the Respondent—that "common to the trade" meant common use at the date when the application was made; and I think that is a very good illustration to shew that the Legislature could not have intended to employ this term in that limited sense. The true solution of the question is very simple—the phrase "common to the trade" is not to be interpreted otherwise than according to the ordinary rules of grammar, and I think "common to the trade" means exactly what it says. I cannot really make use of a better term, but I can make use of a term which I think exactly corresponds with the meaning that it is "open to the trade." Therefore I hold that the Applicant is entitled to an order which is within the 90th section, a variation in fact of the register where, without sufficient cause, something has been entered upon it; or I will make the order as asked

that the Respondent should disclaim any right to the exclusive use of the term "*Washerine*," and I make the order with costs. I may add, as this case may go elsewhere, that, as I understand, Mr. Justice *Kekewich* has come to the same conclusion in *Humphries* v. *Taylor Drug Company* (1), and I also gather that there are *dicta* of Lord Justice *Cotton* in the two cases mentioned in the Board of Trade reports in conformity with what I have decided.

Solicitors: *Wilson, Bristows, & Carpmael; Torr, Janeways, Gribble, & Oddie,* agents for *W. Burtonshaw, Crowle.*

(1) W. N. 1888, p. 214.

W. C. D.

NORTH, J.

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May 23, 27, 28, 29, 30; *June* 3, 4.

BURNABY *v.* BAILLIE.

[1888 B. 488.]

*Legitimacy—Paternity of Child born in Wedlock—Presumption of Legitimacy—Evidence to rebut—Evidence—Admissibility—Verbal Statements by Wife's Paramour—Public Document in Foreign Country—Secondary Evidence—Copy—Admissibility of Evidence of Husband to bastardize Child born in Wedlock—*14 *&* 15 *Vict. c.* 99, *s.* 7 [*Revised Ed. Statutes, vol. xi., p.* 257]—32 *&* 33 *Vict. c.* 68, *s.* 3 [*Revised Ed. Statutes, vol. xvi., p.* 146]—*Power of Appointment—Validity of Exercise—Joint Power to Husband and Wife—Joint Exercise—Reservation of Power of Revocation to Husband alone.*

A husband and wife were married on the 30th of April, 1878, and there were three children born before the marriage was dissolved by reason of the wife's adultery with *W.* The decree *nisi* was made on the 3rd of November, 1886, and it was made absolute on the 17th of May, 1887. The three children were born respectively on the 2nd of July, 1881, the 26th of April, 1885, and the 25th of June, 1886. The legitimacy of the eldest child was admitted. That of the other two children was disputed.

Held, on the evidence, that the legal presumption of the legitimacy of the second child was rebutted, and that it was proved not to be the child of the husband:

Held, also, on evidence which satisfied the Court that the husband could have had no access to the wife between the birth of the second child and the birth of the third child, that the third child was also illegitimate.

Held, that evidence of verbal statements made by *W.* previously to the birth of the second child was admissible as evidence of conduct tending to shew that he was the father of the child.

It being proved that the register of births kept at the *Mairie* at *Hyères* could not be removed:—

Held, that the contents of the entry of the birth of the second child could be proved by a copy the accuracy of which was proved by a witness who had himself compared it with the original.

Held, that, notwithstanding the provision of sect. 3 of the Act 32 & 33 Vict. c. 68, that the evidence of a husband or wife is admissible in a "proceeding instituted in consequence of adultery," the evidence of a husband is not admissible, after the dissolution of the marriage on the ground of the wife's adultery, to prove the illegitimacy of a child born in wedlock.

Guardians of Nottingham v. *Tomkinson* (1), and *In re Walker* (2), followed.

By the settlement made on the marriage a sum of £10,000 was vested in trustees, upon trust to pay the income to the husband during his life;

(1) 4 C. P. D. 343. (2) W. N. 1885, p. 196.

with remainder to the wife during her life or until she should marry again; with remainder, as to the capital, in trust for the issue of the marriage as the husband and wife should by deed, with or without power of revocation and new appointment, jointly appoint, and, in default of appointment, as the survivor should by deed or will appoint, and, in default of appointment, for the children of the marriage as therein mentioned; but, if there should be only one child who should attain twenty-one or marry, as to one moiety of the trust fund in trust for that only child, and as to the other moiety upon the trusts thereinafter declared of the whole fund in case there should be no child of the marriage; and if there should be no child of the marriage, the trustees were, after the determination of the prior trusts and the default of children (which should last happen), to hold the fund in trust for the husband.

The decree *nisi* for the dissolution of the marriage was made on the 3rd of November, 1886. On the 11th of May, 1887, the husband and wife executed a deed by which, in exercise of the joint power contained in the settlement, they irrevocably appointed that, from and after the death of the husband and the death or re-marriage of the wife, one moiety of the trust fund should be held in trust for *R.* (the eldest of the three children), absolutely, if and when she should attain twenty-one or marry under that age; and by the same deed the husband and wife appointed the other moiety of the fund to *R.* in the same way, but subject to a power of revocation and new appointment reserved to the husband alone.

On the 18th of May, 1887, the day after the decree absolute, another deed was executed by the husband and the divorced wife by which she released her life interest in the trust fund in the event of her surviving the husband, and she also renounced and released to him all power of appointment over the fund. On the 30th of November, 1887, the husband executed a deed-poll, by which he absolutely revoked the appointment of the second moiety of the trust fund to *R.*, to the intent that the moiety might devolve as if that appointment had not been made, but subject to any appointment to be thereafter made by him.

The husband claimed a declaration that the trustees of the settlement ought to treat a moiety of the £10,000 as if there were no child of the marriage:—

Held, that the reservation in the deed of the 11th of May, 1887, of a power of revocation to the husband alone was invalid, and that he was not entitled to call on the trustees to hand over a moiety of the £10,000 to him.

TRIAL of action by which the Plaintiff claimed a declaration that the trustees of the settlement executed on his marriage with his late wife (from whom he had been divorced) ought to treat one moiety of the investments, representing a sum of £10,000 brought into settlement by him, as if there were no child of the marriage.

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The wife had three children born before the dissolution of the marriage, but the Plaintiff alleged that the second and third of those children were not his children.

The marriage took place on the 30th of April, 1878. By the settlement, dated the 29th of April, 1878, a sum of £10,000, belonging to the Plaintiff, was vested in the trustees, upon trust for investment as therein mentioned, and to pay the income thereof to the Plaintiff and his assigns during his life, and after his death to the wife, if she should survive him, during her life until she should marry again; and, after the death of the Plaintiff and the death or re-marriage of the wife, the trustees were to stand possessed of the trust funds and the income thereof in trust for the issue of the intended marriage in such manner as the husband and wife should by deed, with or without power of revocation and new appointment, jointly appoint, and, in default of any such and subject to every such appointment, as the survivor of them should in like manner or by will appoint; and, in default of any such and subject to every such appointment, if there should be more than one child of the marriage who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under that age, then as to the entirety of the trust funds in trust for all or both such children in equal shares; but, if there should be only one such child of the marriage, as to one moiety of the trust funds in trust for such only child, and as to the other moiety thereof upon the same trusts as were thereinafter expressed concerning the entirety of the trust funds in the event of there being no such child as aforesaid. And it was thereby declared that, if there should be no such child as aforesaid, the trustees should, from and after the determination of the said trust for the benefit of the wife and such default of children as aforesaid, which should last happen, stand possessed of the trust funds and the income thereof in trust for the Plaintiff absolutely.

After the marriage the husband and wife lived together, and on the 2nd of July, 1881, a daughter named *Ruby* was born. It was not disputed that this child was legitimate.

On the 26th of April, 1885, a son named *Lancelot* was born,

and on the 25th of June, 1886, a daughter named *Muriel* was born. Between the birth of the first child and the birth of the second the wife had a miscarriage. In June, 1886, the husband presented a petition for the dissolution of the marriage, on the ground that the wife had committed adultery with *Sidney Willoughby*, and on the 3rd of November, 1886, a decree *nisi* for dissolution was made. The decree was made absolute on the 17th of May, 1887, and on the 7th of June, 1887, the divorced wife married *Willoughby*.

By a deed dated the 11th of May, 1887, which was expressed to be in exercise of the joint power of appointment contained in the settlement, Mr. and Mrs. *Burnaby* jointly and irrevocably appointed that, from and after the death of the husband and the death or re-marriage of the wife, one moiety of the investments representing the sum of £10,000 should be held in trust for the daughter *Ruby*, her executors and administrators, absolutely, if and when she should attain the age of twenty-one years or marry under that age, which should first happen, and to be then vested and not before; and by the same deed Mr. and Mrs. *Burnaby* jointly appointed that, from and after the death of the husband and the death or re-marriage of the wife, the remaining moiety of the investments representing the sum of £10,000 should be held in trust for the daughter *Ruby*, her executors and administrators, absolutely, if and when she should attain the age of twenty-one years or marry under that age, which should first happen, and to be then vested and not before, but subject to the power of revocation thereinafter contained, viz., provided always that it should be lawful for the husband at any time by deed to revoke the appointment lastly thereinbefore made as to all or any part of the moiety lastly thereinbefore appointed, and either to permit that moiety, or the part thereof to which the revocation should extend, or any portion thereof respectively, to devolve as unappointed, or to make any new appointment thereof which could be made by him solely in case he had survived the wife. And it was also provided that, in case of any such revocation, the daughter *Ruby* should accept the moiety first thereinbefore appointed as and in satisfaction of the moiety to which she was or would be entitled as the only child, and assuming her to be

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the only child, of the husband and wife, and the moiety to which, or any part of which, such revocation should extend, should be taken as the moiety which, in default of appointment and in case of there being only one child to take a vested interest, would devolve as if there were no child to take a vested interest. And by the same deed the wife irrevocably appointed as from her death another sum of £10,000 (part of funds brought into the settlement by her) to the daughter *Ruby*.

By a deed dated the 18th of May, 1887, and made between the Plaintiff, his divorced wife, and the trustees of the settlement, the Plaintiff released and disclaimed all right and power to make any appointment of the funds which had been brought into settlement by the divorced wife, and she released to the trustees all the interest, dividends, and income which under the said settlement she would become entitled, in case of her surviving the Plaintiff, to receive from the investments representing the first-mentioned sum of £10,000, to the intent that those investments on the death of the Plaintiff should be held on the like trusts as if the divorced wife were also dead. And by the same deed the divorced wife renounced and released to the Plaintiff all power of appointment over the investments representing the first-mentioned sum of £10,000.

The deeds of the 11th and 18th of May, 1887, were respectively drawn and executed for the purpose of carrying out certain terms of arrangement made between Mr. and Mrs. *Burnaby* on the 11th of October, 1886, which contained (*inter alia*) the following clauses:—

"3. Mrs. *Burnaby* to execute an irrevocable appointment by deed of the £10,000, mentioned in the settlement as part of the *Headfort* trust funds, and to join Mr. *Burnaby* in appointing £5000, part of Mr. *Burnaby's* trust fund, in favour of their daughter, to be vested at twenty-one or marriage, and to renounce her power of appointment as regards remaining £5000, or at Mr. *Burnaby's* option to renounce her power of appointment over his £10,000.

"4. Mr. *Burnaby* to release his power of appointment to survivor over the residue of Mrs. *Burnaby's* settlement trust funds.

"5. Settlement to be varied so as to deprive Mrs. *Burnaby*, if

she survive Mr. *Burnaby*, of her life interest in Mr. *Burnaby's* £10,000.

"12. Mr. *Wolstenholme* to settle at proper time the necessary documents, and he is to have power to decide any question that may arise as to the construction of these terms, each party agreeing to be bound by his decision."

On the 30th of November, 1887, the Plaintiff executed a deed-poll by which he absolutely revoked the appointment of the moiety of the investments representing the sum of £10,000 secondly made by the deed of the 11th of May in favour of the daughter *Ruby*, to the intent that that moiety might devolve as if that appointment had not been made, but subject, nevertheless, to any appointment thereof to be thereafter made by the Plaintiff.

The Defendants to the action were the trustees of the marriage settlement; the daughter *Ruby*; Mrs. *Willoughby*; and the children, *Lancelot* and *Muriel*, who were alleged to be illegitimate.

The Plaintiff claimed a declaration that the trustees ought to treat one moiety of the investments representing the £10,000 as if there were no child of his marriage with his late wife; or, in the alternative, rectification of the deed of the 11th of May, 1887.

Mrs. *Willoughby* did not appear to the writ. The daughter *Ruby* defended by a guardian *ad litem*. The children *Lancelot* and *Muriel* were represented by the official solicitor.

By the statement of defence delivered on behalf of the daughter *Ruby*, the question was submitted to the Court whether she was the only issue of the marriage between the Plaintiff and his late wife. She relied on the appointments made by the deed of the 11th of May, and objected that in point of law it was not competent for the Plaintiff and his wife to reserve such a power of revocation and new appointment as was contained in the deed of the 11th of May; that that power of revocation and new appointment was invalid; and that the revocation of the appointment purported to be made by the deed-poll of the 30th of November was void.

This was the trial of the action.

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The facts proved by the evidence were shortly as follows:—

The husband and wife lived together in the same house up to the 21st of July, 1884, but prior to that date they had been on very bad terms. They had for a long time occupied separate bedrooms, and it was the habit of the wife whenever her husband was at home to lock the door of her room at night for the purpose of excluding him. It was proved that she used to lock the door when her maid left her at night, and that she used to unlock it in the morning when the housemaid brought her hot water. On some occasions the husband had attempted to enter her room when he came home late, but had found the door locked. She had in speaking of him made use of expressions of dislike almost amounting to hatred. In the second week of July, 1884, the wife's monthly period occurred, but it was over before the 21st of July. On that day she left her husband's house in *London*, and went alone to *Weymouth*. She had previously mentioned to him that she intended to go away from home for a time, and, upon his saying that he would go with her, she had replied that, if he went, she should stay at home. At *Weymouth* she was met by *Willoughby*, who had previously engaged a sitting-room and two bedrooms at an hotel, stating that he wanted one of the bedrooms for a lady. The bedrooms were adjoining each other, *Willoughby* having, when he engaged them, made it a *sine quâ non* that the bedrooms should adjoin each other. It was proved at the trial that the woman who was the chambermaid at the hotel in July, 1884, was dead. Mrs. *Burnaby* and *Willoughby* occupied these rooms until the 23rd July, when he went away. On the 24th of July she left the hotel and moved into a lodging in *Weymouth*, where she was joined by her child *Ruby* and its nurse, who came down from *London* on that day. Mrs. *Burnaby*, with the nurse and child, remained at *Weymouth* in lodgings until the 17th of September, when they returned to the husband's house in *London*. During the time which she spent in the lodgings Mrs. *Burnaby* was constantly visited by *Willoughby*. He used to be with her nearly the whole day, to dine with her in the evening, and often to remain with her till ten o'clock at night. A woman who had been a servant in the lodgings at the time gave evidence that, on one occasion when she went

unexpectedly into Mrs. *Burnaby's* sitting-room, she saw her and *Willoughby* sitting together on the sofa. His arm was round her waist, and they were kissing each other. While Mrs. *Burnaby* was at *Weymouth* the Plaintiff was also away from home at other places. There was evidence which shewed that he could not have been in *Weymouth* during this period. He returned home on the 24th of September, and he and his wife remained together in the house until the 15th of December, living on the same terms as before. During a considerable part of this time she was unwell, and was attended by the family doctor. It was proved that her monthly period had ceased to occur, but she did not communicate to the doctor the fact that she was in the family way, and he did not know that she was, though he was seeing her regularly from about the 24th of September down to the 29th of October. She did not inform her husband's sister, with whom she was on terms of great intimacy, that she was in the family way. On the 15th of December she left her husband's house, and she never returned there. Before going away she did not communicate to any one the fact that she was in the family way. Within a month from this date she was living with *Willoughby* at an hotel at *Hyères*, in *France*. They were living together as man and wife, under the names of Mr. and Mrs. *Bradbury*. They remained at the hotel about a month, and then moved into lodgings which were kept by a Mrs. *Hook*, an Englishwoman, whose husband was the verger of the English church at *Hyères*. They represented themselves to Mrs. *Hook* as Mr. and Mrs. *Bradbury*, and she believed them to be married. *Willoughby* told Mrs. *Hook* that he wanted the rooms for the purpose of the approaching confinement of his wife, which was expected to take place at the end of April or the beginning of May. With the aid of Mrs. *Hook*, *Willoughby* made all the necessary arrangements for Mrs. *Burnaby's* expected confinement, such as the attendance of doctors. It was found impossible to procure the attendance of an English nurse, and Mrs. *Hook*, who had been trained and had had some experience as a ladies' nurse, offered herself to act and did act as nurse on the occasion. *Willoughby* acted in every respect as if he were the husband of Mrs. *Burnaby*.

The child *Lancelot* was, as above stated, born on the 26th of April, 1885, which was 279 days from the 21st of July, 1884.

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Immediately afterwards *Willoughby* registered the birth at the *Mairie* of *Hyères*, in compliance with the French law. He described himself as the father of the child, and signed the book in the name of "*Sidney Bradbury*," stating that the mother of the child was his wife. *Willoughby* was unable to speak French, and in making the registration Mr. *Hook* acted as interpreter between him and the French officials. After the birth of the child *Willoughby* always spoke of it as his child, and acted in every respect as if he were the father. There was evidence that the child bore a strong resemblance to him, but other witnesses said there was no such likeness. A number of medical witnesses were examined, and the effect of their evidence (with one exception) was, in the opinion of the Court, that the usual period of gestation of a woman with child is from 273 or 274 days up to 279 or 280 days, though it is occasionally either longer or shorter by eight or nine days.

With regard to the child *Muriel*, it was, in the opinion of the Court, satisfactorily proved that the Plaintiff was never in the same place as his wife during a period consistent with his having been the father.

Napier Higgins, Q.C., *C. A. Middleton*, and *A. Young*, for the Plaintiff.

Giffard, Q.C., and *Methold*, for the children *Lancelot* and *Muriel*.

Sefton Strickland, for the daughter *Ruby*.

Cozens-Hardy, Q.C., for the trustees of the settlement.

Mrs. *Hook* was called as a witness for the Plaintiff, and his counsel proposed to ask her questions with regard to conversations between herself and *Willoughby* as to the time when the confinement of Mrs. *Burnaby*, whom he represented to be his wife, was expected to occur, and with regard to the engagement of a doctor and a nurse to attend on her.

Giffard, Q.C., objected to the admissibility of such conversations:—

Declarations of a husband or a wife are inadmissible to bastardize

a child born in wedlock: *Goodright* v. *Moss* (1). Neither a husband nor a wife can be asked, directly or indirectly, any question tending to prove non-access. This rule was not departed from in *The Aylesford Peerage Case* (2); it was only held that statements of husband or wife which tended to shew what their conduct was at the time were admissible. In that case a letter of Lord *Blandford*, the adulterer, was admitted only for the purpose of introducing a letter written by Lady *Aylesford*, the wife; not as evidence of his conduct, which was proved *aliunde*. *Willoughby* can be called as a witness.

Napier Higgins, Q.C., for the Plaintiff, was not called upon.

NORTH, J.:—

I think this evidence is admissible. I cannot distinguish these statements made in conversation from the letter of Lord *Blandford*, which was deliberately admitted by the House of Lords in *The Aylesford Peerage Case* (3). It seems to me that the verbal statements of Mr. *Willoughby* are just as admissible as if he had put them into writing. I do not treat the statements as evidence of the truth of the matters stated, but I think they are admissible as shewing that he was making arrangements for the expected confinement of the lady whom he was then living with, and representing as his wife.

Napier Higgins, Q.C., for the Plaintiff, tendered in evidence an official French certificate of the entry in the register at the *Mairie* at *Hyères* of the birth of the child *Lancelot*. A French witness named *Roux* proved that he had compared the certificate with the original entry, and that it was an accurate copy. There was evidence that the original book could not be removed from the *Mairie*.

[NORTH, J.:—If the original book cannot be produced, I think you are entitled to give secondary evidence of its contents, but I do not see how this document is evidence *per se*.]

It is an official document in conformity with the law of

(1) 2 Cowp. 591. (2) 11 App. Cas. 1.
(3) 11 App. Cas. 1, 8.

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France, and is admissible under sect. 7 of *Lord Brougham's Act* of 1851 (14 & 15 Vict. c. 99).

[NORTH, J.:—I do not think that section applies. In my opinion the entry of the birth was not a "judicial proceeding of any Court of Justice," or a "legal document filed or deposited in any such Court."]

At any rate, it is admissible because the witness is able to state from recollection, by the aid of the copy, what the contents of the original are.

Giffard, Q.C., for the children *Lancelot* and *Muriel*:—

Secondary evidence of the contents of the register cannot be admitted. "Copies of foreign and colonial registers are admissible only on proof that they are required to be kept, either by the law of the country to which they belong, or by the law of this country:" *Taylor* on Evidence (1).

NORTH, J.:—

I think this document is clearly admissible. The passage quoted from *Taylor* on Evidence has nothing to do with the point. The learned author is there speaking of official documents, which are admissible as such, documents which prove themselves. The witness has compared the document with the original book, and tells me what is in the book. The document is admissible, not as an official document, but because the witness has compared it with the original, and by that means is able to say what the original contains. I am not now deciding anything as to the value of the evidence, but only that it is admissible secondary evidence of the contents of a foreign official book which cannot be produced here.

Napier Higgins, Q.C., *C. A. Middleton*, and *A. Young*, for the Plaintiff, proposed to call the Plaintiff as a witness:—

The Plaintiff's evidence is admissible on the issue of legitimacy in this action, the action being a proceeding "instituted in consequence of adultery" within the meaning of the *Evidence Further Amendment Act*, 1869 (32 & 33 Vict. c. 68), s. 3.

(1) 7th Ed. vol. ii. p. 1328, plac. 1593.

In *In re Rideout's Trusts* (1) it was held that such evidence required corroboration; that shews that it is admissible. In this case there is corroboration; if corroboration of the husband's evidence is necessary before it can be admitted there is no reason for not admitting it. Vice-Chancellor *Hall*, following *In re Rideout's Trusts*, did admit the husband's evidence in *In re Yearwood's Trusts* (2). The Judges of the Common Pleas Division no doubt did in *Guardians of Nottingham* v. *Tomkinson* (3) refuse to admit a husband's evidence of non-access in proceedings against him to compel maintenance of a child born in wedlock, and Mr. Justice *Grove* disagreed with the view of *In re Rideout's Trusts* taken by Vice-Chancellor *Hall* in *In re Yearwood's Trusts*; but the Court would have followed *In re Yearwood's Trusts* (as appears from the judgment of Mr. Justice *Lopes*) had they considered it directly in point. In *The Aylesford Peerage Case* (4) Lord *Bramwell* questions whether the rule excluding the testimony of husband and wife on the ground of public policy exists since the passing of the Act.

Giffard, Q.C., and *Methold*, for the children *Lancelot* and *Muriel*, were not called upon.

NORTH, J.:—

I must reject this evidence. The two cases cited do not seem to me to support the view put forward by the Plaintiff's counsel. *In re Rideout's Trusts*, before Vice-Chancellor *James*, seems an authority against the argument of Mr. *Higgins*, not in his favour. The view taken by Vice-Chancellor *Hall* in *In re Yearwood's Trusts* seems to me founded on a misapprehension of *In re Rideout's Trusts*. I should have hesitated to say so on my own authority only, but the Common Pleas Division took the same view in *Guardians of Nottingham* v. *Tomkinson*. I have a reference also to a case before Mr. Justice *Kay*: *In re Walker* (5). That was a summons for the maintenance of a female infant, who claimed, as a child of *Cecilia Ann Jackson*, to be entitled to a half-share of a fund of £1500. The husband of Mrs. *Jackson*,

(1) Law Rep. 10 Eq. 41.
(2) 5 Ch. D. 545.
(3) 4 C. P. D. 343.
(4) 11 App. Cas. 8.
(5) W. N. 1885, p. 196.

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on behalf of a child of the marriage, disputed the title of the applicant, alleging that she was born at a time when Mrs. *Jackson* was living separate from him, and that the applicant was proved by the dates to be illegitimate. The husband tendered an affidavit in which he denied having had sexual intercourse with his wife for a period before the birth of the child exceeding the period of gestation. *In re Rideout's Trusts* (1) and *In re Yearwood's Trusts* (2) were cited. Mr. Justice *Kay* declined to follow *In re Yearwood's Trusts*, and held that the evidence of the husband to prove non-access could not be received; and on the other evidence he refused the application. That is a case exactly in point, and I cannot receive the evidence of the Plaintiff.

Napier Higgins, Q.C., *C. A. Middleton*, and *A. Young*, for the Plaintiff:—

Evidence is admissible to rebut the presumption of the legitimacy of a child born in wedlock, and to prove that it is illegitimate: *The Aylesford Peerage Case* (3); *Bosvile* v. *Attorney-General* (4). The evidence in the present case rebuts the presumption, and proves that the children *Lancelot* and *Muriel* are not the children of the Plaintiff.

Giffard, Q.C., and *Methold*, for the children *Lancelot* and *Muriel*:—

The evidence is not sufficient to rebut the legal presumption of legitimacy. The Plaintiff has not proved, as he is bound to do, that it is impossible that he should have been the father. If there is any reasonable doubt the Court will presume legitimacy: *Plowes* v. *Bossey* (5); *Morris* v. *Davies* (6). In *Foster* v. *Cook* (7) a child of the widow of a testator born forty-three weeks after his death was found to be legitimate. In *The Aylesford Peerage Case* the circumstances were much stronger to prove illegitimacy than in the present case, which is much more like *Bosvile* v. *Attorney-General*. There is no satisfactory evidence of adultery before

(1) Law Rep. 10 Eq. 41.
(2) 5 Ch. D. 545.
(3) 11 App. Cas. 1.
(4) 12 P. D. 177.
(5) 2 Dr. & Sm. 145.
(6) 5 Cl. & F. 163.
(7) 3 Bro. C. C. 347.

December, 1884. After that time no doubt *Willoughby* and Mrs. *Burnaby* were living in adultery. But they were representing themselves to be man and wife, and it was essential to the maintenance of that character that they should represent the child to be theirs.

Sefton Strickland, for the daughter *Ruby*.

Cozens-Hardy, Q.C., for the trustees.

NORTH, J.:—

The question which I have to decide is, whether two of the three children born during the marriage of the Plaintiff with his divorced wife are or are not his children, and I have come to the conclusion that there is ample evidence that neither of the two is a child of the Plaintiff. [His Lordship stated some of the facts, and continued:—] I do not entertain the slightest doubt that Mrs. *Burnaby* went to *Weymouth* by appointment with Mr. *Willoughby*, or that adulterous intercourse took place between them during that visit. It is clear that during the time in which the family doctor was attending Mrs. *Burnaby* in September and October, 1884, she was in the family way, and yet she never mentioned this fact to him. Her silence is very significant, and I cannot conceive why she should have concealed her condition from him, unless the reason was that she knew the child of which she was then pregnant was not the child of her husband. During the same period Mrs. *Burnaby* was constantly seeing her husband's sister, Mrs. *Manners Sutton*, of whom she was very fond, and with whom she was very intimate, and yet she never mentioned the fact of her pregnancy to her. Why it should not have been mentioned, if the child was the child of her husband, I cannot conceive. On the 15th of December, Mrs. *Burnaby* left her home, without having communicated her condition to any one, and there can be little doubt that she went away with *Willoughby*. Within a month afterwards she was living with him as his wife at an hotel at *Hyères*, in *France*. [His Lordship then stated the other facts as to the birth of the child *Lancelot* at *Hyères*, and the conduct of *Willoughby* as regarded him before and after

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his birth; the registration of his birth; the birth of the child *Muriel* and the registration of her birth; and the divorce proceedings, and continued:—]

A certificate of the registration of the birth of the child *Lancelot* at the *Mairie* was put in, and its admissibility was objected to. I think that what took place about the registration is fully proved without the certificate, for *Willoughby* could not speak French, and he made the registration through the medium of Mr. *Hook* as interpreter, who has given evidence as to what took place. In my opinion the certificate is admissible, because M. *Roux* proved that he had compared it with the original entry in the register, and that it is an accurate copy, and it stands in the same position as a copy made by himself to refresh his memory. I think it is also admissible as an examined copy of a French official document. All these facts, in my opinion, tend to only one possible conclusion, viz., that the two children *Lancelot* and *Muriel* cannot be other than the children of Mr. and Mrs. *Willoughby*. I treat the evidence of the statements which were made by them, not as evidence of the truth of the statements which they made, but merely as proving that they did make those statements, thus shewing what their conduct was at the time.

The only question, then, is, whether there was such possibility of access by the husband to the wife as to displace the result of this evidence by reason of the legal presumption in favour of legitimacy. This applies only to the child *Lancelot*.

The 21st of July, 1884, the day on which Mrs. *Burnaby* left her home, was the 279th day before the day on which that child was born. A good deal of medical evidence was adduced as to the ordinary length of the period of gestation. The witnesses do not all quite agree on this point, but they agree in substance, with the exception of Dr. *Barnes*. He is the only medical witness who really differs from the others, and I cannot accept his views in opposition to theirs. I must accept their views in preference to his. And the conclusion to which I have come upon their evidence is, that the usual period of gestation is from 273 or 274 days up to 279 or 280 days, though there is a good deal of evidence which shews that the period is sometimes

longer or shorter—that there is sometimes a difference of eight or nine days in either direction. But, having regard to the normal or usual period of gestation, the medical evidence does not enable me to come to a positive conclusion that the child *Lancelot* was the child of *Willoughby* rather than of the Plaintiff. But I do find this, that up to the 21st of July Mrs. *Burnaby* was living in the same house with her husband. That, however, is not conclusive, and I have to decide the question of fact which was thus stated by Lord *Lyndhurst* in *Morris* v. *Davies* (1): "Whether the circumstances are such as to satisfy me that no sexual intercourse did take place between these parties, at the period to which reference is had." Mr. and Mrs. *Burnaby* had for a long time been leading a very unhappy life. The cause of this I do not know. They had for some years occupied separate bedrooms, and the wife had invariably looked the door of her room at night when her husband was at home. Her whole object in doing so was to exclude him. She spoke of him in terms expressive of extreme dislike. Upon this evidence I find as matter of fact that no sexual intercourse had taken place between them for some time prior to the 21st of July. Her acts, to my mind, are clear and palpable, and I am satisfied that an arrangement had been made between her and *Willoughby* for the purpose of his taking the rooms at *Weymouth* to which she went on that day.

I hold, therefore, that the question whether the circumstances are such as to satisfy the Court that no sexual intercourse took place between Mr. and Mrs. *Burnaby* within a period prior to the 21st of July to which the birth of the child *Lancelot* could be referred, must be answered in the affirmative.

There is, however, another point to be considered. The husband and wife were living together again in the same house after the 24th of September, 1884, and there is no evidence of non-access at that time. But the evidence of Mrs. *Hook* is clear and reliable that the child *Lancelot* was at his birth at least an eight months' child, and indeed that he was fully matured. This makes it clear that he could not have been begotten in the previous September. Evidence was adduced to shew a strong

(1) 5 Cl. & F. 216.

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likeness between the child *Lancelot* and *Willoughby*. But there was also evidence to the contrary, and I set the one against the other, and leave this element out of consideration in forming my opinion. I am satisfied with regard to the child *Lancelot* that there is ample evidence that he is not the child of the Plaintiff.

I do not think it is necessary to refer at any length to the law on the subject. It is fully stated in *The Banbury Peerage Case* (1) and in *Morris* v. *Davies* (2). I will only refer to the recent case of *Bosvile* v. *Attorney-General* (3), in which Sir *J. Hannen* directed the jury in accordance with *Morris* v. *Davies*, and this ruling was approved by the Divisional Court, who said (4): "There is the highest authority for saying that the presumption in favour of legitimacy may be rebutted by evidence." The facts of that case were very like those of the present case, and, though there was nothing there to prove the impossibility of access by the husband, the Court held that the jury were not wrong in regarding the evidence against the legitimacy of the child as conclusive. In my opinion the evidence against legitimacy is much stronger in the present case. In that case, again, the Divisional Court said (5): "The lady herself seems to have regarded the child as the child of Mr. *Craven*, and not of her husband. The time fixed by her for the attendance of the monthly nurse was obviously based on a calculation which placed the commencement of the period of gestation subsequent to the day on which she left her husband's house, from which day she was living in adultery with *Craven*." I think that what took place in the present case with regard to the attendance of the doctors and the nurse before the birth of *Lancelot* is very strong evidence to shew that the calculation of the time at which Mrs. *Burnaby's* confinement was expected to take place, referred to something which happened after she left her husband's house on the 21st of July. With regard to the conduct of *Willoughby* and Mrs. *Burnaby*, it is said that they may have been mistaken in thinking that the child was the child of *Willoughby*.

(1) Le Marchant's *Gardner Case*, App. 389.
(2) 5 Cl. & F. 163.
(3) 12 P. D. 177.
(4) Ibid. 181.
(5) Ibid. 183.

But their conduct is the strongest possible evidence that something had taken place between them which made it not only possible but probable that the child was *Willoughby's* child.

With regard to the child *Muriel* I think the case is clear. The evidence satisfies me that there was no possibility of access by the husband during the period to which her conception can be referred.

Adopting the rules of law laid down in the cases to which I have referred, the evidence that the children *Lancelot* and *Muriel* are not the children of the Plaintiff is ample and conclusive, and I must declare that the child *Ruby* was the only child of the marriage between the Plaintiff and his late wife.

Napier Higgins, Q.C., *C. A. Middleton*, and *A. Young*, for the Plaintiff:—

It being now established that the daughter *Ruby* is the only child of the marriage between the Plaintiff and his late wife, the Plaintiff is entitled to have a moiety of the £10,000 handed over to him by the trustees. If he had abstained from making any appointment half the fund would ultimately have come to him. By the arrangement which was made, and which has been carried out by the deeds which have been executed, the child *Ruby* has obtained the benefit of the appointment made in her favour by her mother, and the appointment of half the £10,000. The wife has released her power, and it would not have been reasonable that she should retain as possible survivor a power to appoint. There has been no corrupt or improper use of the power; the arrangement is equivalent to what the Divorce Court would have done, if it had been asked to alter the provisions of the settlement. If necessary, the Court can rectify the appointment. When Mrs. *Burnaby* released her power of appointment she had become a *feme sole*. A power may be disclaimed, and after disclaimer it may be exercised "by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power": *Conveyancing Act*, 1882, s. 6. On the exercise of a joint power of appointment by husband and wife a power of revocation may be reserved to them, or the

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survivor of them, and a revocation by the survivor will be valid: *Brudenell* v. *Elwes* (1); *Sugden* on Powers (2). Mrs. *Burnaby* had ceased to have any interest, and stood in the same position as if the Plaintiff had been the survivor. The Plaintiff is tenant for life, and the remainder is vested in him as to the £5000. He can give a good discharge to the trustees.

Sefton Strickland, for the child *Ruby* :—

The joint appointment is good, but the reservation of a power of revocation to the Plaintiff alone is void.

[He was stopped by the Court.]

Cozens-Hardy, Q.C., for the trustees.

NORTH, J.:—

The statement of claim asks in effect for a declaration that the trustees of the settlement ought now to hand over one moiety of the £10,000 to the Plaintiff. I do not think he is entitled to call for it now.

[His Lordship stated the provisions of the settlement, the agreement of the 11th of October, 1886, and the deeds of the 11th and 18th of May, 1887, and the other facts, and continued :—]

No one suggests that the appointment of the first moiety to the daughter *Ruby* is not perfectly good, though, of course, it is contingent upon its becoming absolutely vested in her, but, so far as it goes, it is perfectly good. Then by the same deed the second moiety is appointed to her, subject to the power of the Plaintiff to revoke the appointment. And by the deed of the 18th of May, Mrs. *Willoughby* purported to execute a release of all power of appointment over the £10,000.

Now, as regards the arrangement effected by these deeds, I am not satisfied that it was good at all, and, for this reason, the object of it is admitted to have been to enable Mr. *Burnaby* to receive £5000 out of the funds absolutely at once. That, in my opinion, was not a legitimate object for the exercise of the power. The power was simply to appoint for the issue of the marriage in such manner as the parents should jointly appoint. An exercise

(1) 7 Ves. 382. (2) 8th Ed. pp. 364, 365.

of that power to be valid must be for the benefit of the issue, and for no other purpose. I am not satisfied, therefore, that the attempted exercise was not wholly void. But even if it was clearly good as to the first moiety, still, as to the second moiety, the appointment is to the daughter *Ruby*, subject to a power of revocation by one of the two joint appointors alone. No authority has been produced to shew that such a delegation of a joint power to one of the two donees is admissible. What the settlement contemplated was a revocation by the two, or possibly by the survivor, if one of the two had become by death incapable of acting; but there is nothing to shew any intention that the power of revocation given to the two should be exercised by one of them alone during the lifetime of the other. In my opinion, therefore, this attempt to give to the Plaintiff alone a power to revoke the joint appointment was altogether invalid, and I do not see how he can claim to receive the £5000 under such a revocation.

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Then I am asked to rectify the deed of the 11th of May, 1887, but I do not see any possible ground for rectification. I have read the clause by which the parties agreed to leave the settlement of the deeds which were to carry out the terms agreed upon to Mr. *Wolstenholme*. The matter was discussed with him by the solicitors of the parties, and the deed of the 11th of May was finally settled by him as the person to whom, by the 12th clause of the agreement of the 11th of October, the power of settling the terms had been delegated by the parties, who had agreed to be bound by what he did. That power was vested in him, and I do not see how I can say that what he did was not done rightly, or that I have any control by way of rectification over what he decided to be right between the parties. Nor do I see that there was in fact any mistake in what was done. It was done deliberately for the purpose of giving effect to what he advised them would be the best way of carrying out the agreement between them. I cannot, therefore, make any order for rectification.

Sefton Strickland, for the daughter *Ruby*:—

Will your Lordship make a declaration that the two appointments are good?

NORTH, J.

1889

BURNABY v BAILLIE

NORTH, J.:—

I feel a difficulty in doing that, because the matter has not been gone into so fully as to enable me to decide whether there was a fraud on the power or not. I simply refuse to make a declaration that the Plaintiff is entitled to have a moiety of the fund handed over to him now.

Solicitors: *Sanderson, Holland, & Adkin; The Official Solicitor; Roy & Cartwright; Cookson, Wainewright, & Pennington.*

W. L. C.

NORTH, J.

1889

July 2.

In re SMITH.
HENDERSON-ROE *v.* HITCHINS.

[1889 S. 845.]

Trustee—Executor—"Property held by trustee in trust for an infant"—Bequest of Residue to Infant—Application of Income by Executors for Maintenance of Infant—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testatrix bequeathed "the residue of my money" to an infant:—

Held, that, the estate being cleared and the residue ascertained, the executor would hold the residue in trust for the infant within the meaning of sect. 43 of the *Conveyancing and Law of Property Act*, 1881, and would be entitled to apply the income for the infant's maintenance, education, or benefit, as provided by that section.

ORIGINATING SUMMONS to determine certain questions arising upon the will of *Caroline Smith*, who died on the 14th of December, 1888.

The testatrix, by her will, dated the 26th of July, 1888, appointed the Plaintiff to be her executor, and directed that all her just debts and funeral and testamentary expenses should be paid as soon as conveniently might be after her decease. After bequeathing some small pecuniary legacies, and five legacies of £1000 each, the will continued: "I leave the residue of my money (including the £750 settled on my brother *Charles H. Smith* at his death) to my cousin *Dorothy Hitchins*. My sister *Emma Maria Smith* my books and trinkets, and my plate and furniture to be

equally divided between my two cousins *C. J. Smith* and *C. W. Hitchins*. My executor the sum of £19 19*s*."

At the time of the death of the testatrix her personal estate consisted of a small sum of cash in the house; a balance of £122 at her bankers; investments amounting to £7912 and consisting of the stocks of various railway companies, and the debentures and bonds of companies and colonial governments; the reversion on the death of her brother *Charles* in one-fourth share of a sum of £3220 *Lancashire and Yorkshire Railway* debenture stock, which share had been purchased for £750, and books and trinkets, plate, furniture and wearing apparel, valued altogether at £139. She had no real estate.

At the date of her will her property consisted of the same particulars, except that the cash in her house and the balance at her bankers were respectively of slightly different amounts.

The summons was issued by the executor, as Plaintiff, against *Dorothy Hitchins* (who was an infant), and two sisters of the testatrix, as Defendants. It asked the determination (*inter alia*) of the questions (1) what property of the testatrix was included in the gift of the residue of her money; (2) whether the Plaintiff was at liberty to pay the whole, or any and what part, of the income of the property to which *Dorothy Hitchins* should be held to be entitled under the will to her father, under the provisions of sect. 43 of the *Conveyancing Act*, 1881.

NORTH, J., held that the gift of "the residue of my money" comprised the stocks, shares and securities for money which formed part of the estate of the testatrix at the time of her death.

Grosvenor Woods, for the Plaintiff:—

Another point arises on the construction of sect. 43 of the *Conveyancing Act*, 1881. The Plaintiff desires to act upon the power conferred by that section of dealing with the income of the residue for the benefit of the infant. The question is whether the plaintiff as executor is a "trustee" within the meaning of sect. 43 (1). I submit that he is.

(1) Sect. 43 provides: "Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on

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[He referred to sects. 31, 32, 35, 37 of the Act.]

C. Browne, for the infant.

G. Curtis Price, for the sisters of the testatrix.

NORTH, J.:—

I think the point is clear. The testatrix, after directing the payment of her debts and funeral and testamentary expenses, and bequeathing some pecuniary legacies, left "the residue of her money" to an infant. She also bequeathed some specific legacies. It is the duty of the executor to clear the estate—to pay the debts, funeral and testamentary expenses, and the pecuniary legacies, and to hand over the assets specifically bequeathed to the specific legatees. When all this has been done a balance will be left in the executor's hands, and I think it is plain that this balance will be held by him in trust for the infant within the meaning of sect. 43. In *Phillipo* v. *Munnings* (1) the question arose, whether a suit against the executor of an executor to recover a sum of money which the original testator had bequeathed to his executor upon certain trusts, the ultimate trust being for *John Buscall*, who was dead intestate, the plaintiffs being his next of kin, was "a suit to recover a legacy" within the meaning of the *Statute of Limitations*, 3 & 4 Will. 4, c. 27. The defendant's testator had set apart the sum of £400 to answer the legacy. Lord *Cottenham* held that the suit was not a suit to recover a legacy. He said (2): "The whole fallacy of the defendant's argument consists in treating this suit as a suit for a legacy. Now, the fund ceased to bear the character of a legacy, as soon as it assumed the character of a trust fund. Suppose the fund had been given by the will to anybody else as a trustee, and not to the executor; it would then be clearly the case of a breach of trust."

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the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

(1) 2 My. & Cr. 309.

(2) Ibid. 314.

Again in *Dix* v. *Burford* (1) executors had assented to a specific bequest of £400 (which was secured by a conditional surrender of copyholds which had become absolute) to them upon certain trusts. The executors did not procure themselves to be admitted, and one of them alone received the money and released the estate and misapplied the money. It was held that the co-executor had become a trustee, and was liable to make good the money. Lord *Romilly*, M.R., said (2): "The first question here is, whether the relation of trustee and *cestui que trust* existed? There is a specific legacy of this mortgage for £400, and a bequest of the residue to the executors. The moment the executors assented to the bequest, they became trustees for their *cestuis que trustent*, the £400 then ceased to be part of the testator's assets, and it became a trust fund for the benefit of the plaintiff for life, and afterwards for his children, and the executors became mere trustees for them of that fund."

In my opinion it makes no difference for this purpose whether a pecuniary legacy payable out of the estate is given to an infant, or the residue of the testator's estate is given to an infant, so soon as that residue is ascertained. I might refer to many other cases, but I think those two are sufficient to shew what the clearly settled rule of law is. In my opinion the residue of the money in the hands of the executor, after satisfying all the previous trusts of the will, is property held by the executor in trust for the infant within the meaning of sect. 43.

Solicitors: *Tamplin, Tayler, & Joseph*, agents for *Verrall & Borlase, Brighton; J. L. Tomlin; Bowlings, Foyer, & Hordern.*

(1) 19 Beav. 409. (2) 19 Beav. 412.

W. L. C.

NORTH, J.
1889
July 8.

In re DIXON.
BYRAM *v.* TULL.

[1889 D. 213.]

Will—Construction—Husband and Wife.

A testator gave his residue to *A.* and *B.* his wife, *C.* the wife of *X.*, *D.* the wife of *Y.*, *E.*, *F.* and *G.* his wife:—

Held, that the residue was divisible into sevenths, *A.* and *B.* his wife, and *F.* and *G.* his wife, taking separately.

Warrington v. *Warrington* (1) followed.

In re Jupp (2) commented on.

THOMAS GEORGE DIXON, the testator in this summons, died in September, 1882, having made a will by which, after the death of his wife, he devised and bequeathed the residue of his estate unto "*William Byram*, *Elizabeth Byram* his wife, *Sarah Byram*, wife of *Henry Richards*, *Jane Byram*, the wife of *George Davis*, *George Dixon Byram*, *Cyrus Carter*, and *Charlotte Carter* his wife, to be equally divided between them, share and share alike." The testator's widow died in December, 1887.

This was an originating summons to determine, among other questions, whether the testator's residue was divisible into sevenths (Mr. and Mrs. *William Byram* taking one share each, and Mr. and Mrs. *Carter* taking one share each), or whether the residue was divisible into fifths (Mr. and Mrs. *William Byram* taking one share only and Mr. and Mrs. *Carter* taking one share only). The Plaintiffs were the residuary legatees other than Mr. and Mrs. *Carter*. The Defendants were the surviving trustee of the will and Mr. and Mrs. *Carter*.

Ingpen, for the Plaintiffs (other than Mr. and Mrs. *Byram*), argued that the residue was divisible into fifths, Mr. and Mrs. *William Byram* taking one share between them, and Mr. and Mrs. *Carter* also only taking one share between them.

The rule that a husband and wife were to be treated as one person upon the construction of a gift to them with other

(1) 2 Hare, 54. (2) 39 Ch. D. 148.

persons was not affected by the *Married Women's Property Act*, 1882: *In re March* (1). Even if it were this case would not be affected because the testator died before the Act came into operation. The words in this case are undistinguishable from those in *In re Jupp* (2), before Mr. Justice *Kay*, a case in which older cases, which had been excepted from the rule, were cited.

Eve, for the Defendants *Carter*:—

The rule that in a gift to a husband and wife and a third person the husband and wife are treated as one person only is a technical rule which a slight indication of intention to the contrary will displace: *Dias* v. *De Livera* (3). The case of *Warrington* v. *Warrington* (4) is a case exactly like the present in principle; that case and a somewhat similar exception to the rule, *Paine* v. *Wagner* (5), have been recognised as good exceptions upon slight difference of language: *Bricker* v. *Whatley* (6); *In re Wylde* (7). The case of *In re Jupp* was mainly argued and entirely decided upon the effect of the *Married Women's Property Act*, 1882. Mr. Justice *Kay* does not refer to *Warrington* v. *Warrington* in his judgment.

Ingpen, in reply:—

The real ground of the decision in *Warrington* v. *Warrington* is that the husband and wife were equally related to the testatrix and were her nephew and niece; there was therefore a very good reason why she should give them a share each. The decision was before Mr. Justice *Kay* in *In re Jupp*. He evidently did not consider it applicable.

NORTH, J.:—

The question is whether the rule of English law that a gift to a man, his wife and a third person is to be construed as a gift of a moiety to the husband and wife and of the other moiety to the third person is to be applied here, so that *William Byram* and *Elizabeth* his wife take one share only between them, and *Cyrus*

(1) 27 Ch. D. 166.
(2) 39 Ch. D. 148.
(3) 5 App. Cas. 123, 135.
(4) 2 Hare, 54.
(5) 12 Sim. 184.
(6) 1 Vern. 233.
(7) 2 D. M. & G. 724.

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1889
In re DIXON. BYRAM v. TULL.

Carter and *Charlotte Carter* his wife also take only one share between them.

As is pointed out in the cases, a very little indication to the contrary is sufficient to lead to an opposite construction; adopting the language of the judgment of the Privy Council in *Dias* v. *De Livera* (1): "The rule of English law that a gift to a man and his wife, and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person, is founded on the doctrine of English law that husband and wife are, for most purposes, one person. And yet any indication, however slight, of an intention that each shall take separately has been held to defeat the application of this doctrine. *Warrington* v. *Warrington* (2), *Paine* v. *Wagner* (3), and other cases illustrate the nice distinctions which have been given effect to on this subject. Lord Justice *Knight Bruce*, in *In re Wylde* (4), attributes the rule to the position, which he describes as 'peculiar,' of husband and wife under our law." Now, that seems to me a statement of the law by the Privy Council, and also a recognition of *Warrington* v. *Warrington* and *Bricker* v. *Whatley* (5) as cases well decided upon the nice distinction recognised. It is material, then, to see what are those cases. In *Warrington* v. *Warrington* the words are these: "With all the rest, residue, and remainder of my trust estate and property whatever and wherever not herein disposed of, I leave equally between my brother *Thornhill Warrington*, my sister *Anne Van Corlandt*, widow, my nephew, *William Henry Warrington*, and *Emma* his wife"—that is to say, between four legatees named, the only copulative being between the third and fourth—"their heirs and assigns, nevertheless subject to any bequest and legacy herein mentioned." It was given equally between them; they therefore took as tenants in common. There it was held that the gift was between all four equally, the husband and wife not taking one share only between them. The Vice-Chancellor there referred to *Bricker* v. *Whatley* in this way (6): "It may be observed that *Littleton*, in stating the rule which has been referred to, always illustrates it

(1) 5 App. Cas. 135.
(2) 2 Hare, 54.
(3) 12 Sim. 184.
(4) 2 D. M. & G. 724.
(5) 1 Vern. 233.
(6) 2 Hare, 56.

by placing the husband and wife as the first parties to whom the estate is made; and in *Bricker* v. *Whatley* (1), the occurrence of the word 'and' before the names of the husband and wife is adverted to by the Lord Keeper." Then he says: "The husband and wife are equally of kin to the testatrix: and there is nothing in the disposition of the names which can import any intention to treat either of them differently from the other legatees. I cannot do otherwise than hold the gift to be a gift in severalty to several persons; and the residue must therefore be divided into four shares, and the husband and wife declared to be entitled each to one of such shares." Now, it is said that the decision turned on the fact that the legatees were equally related to the testatrix. That is not so. The husband and wife were; the other legatees were not. The fact that the husband and wife were equally related to the testatrix, the other legatees not being so, can throw no light upon the construction. I do not understand how that can affect the meaning, and I do not think it was a governing ground of the decision. That decision is, as I say, recognised as law in the Privy Council, in the case to which I have referred. The case of *Paine* v. *Wagner* (2) was also referred to and recognised as law. That is a rather complicated case, and the words are distinct, and I do not think it throws very much light on the present case. The former case seems to me undistinguishable from the present.

A decision of Mr. Justice *Kay* is relied upon—*In re Jupp* (3)—and I must say that if that had been the only case on the subject I should have thought the words in the will in that case so like those in the present that I should have been prepared to follow it. The words there were, "and one share between my sister *Mary Buckwell*, *Daniel Buckwell*, her husband, and *Harriet Buckwell*, her stepdaughter, in equal parts." Mr. Justice *Kay* on that held that Mr. and Mrs. *Buckwell* took one-half share only and their stepdaughter took the other half. The ground of the decision is put in the judgment shortly in this way: "Unless this gift is affected by the *Married Women's Property Act*, 1882, Mr. and Mrs. *Buckwell* would take one-half, and *Harriet*, the stepdaughter,

(1) 1 Vern. 233. (2) 12 Sim. 184.
(3) 39 Ch. D. 148, 151.

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the other half: *Bricker* v. *Whatley* (1), *In re Wylde* (2). In the last case, *Paine* v. *Wagner* (3), which was relied on before me, was considered as not a binding authority." That case, he says, is considered as not a binding authority. I put it on one side and look at the two cases referred to. In *Bricker* v. *Whatley* there was a gift by a testator of all the residue and surplus of his estate to *A.*, *B.*, and *C.*, and the wife of *C.*, there being an "and," so that there was a copulative conjunction between the second and third names, as well as another linking the husband and wife. The Lord Keeper held "that the husband and wife should have but one third part; and the rather for that he observed the two 'ands' in this devise, namely, to *A.*, *B.* and *C.*, and *W.* his wife: and though a man may devise to ten persons, and add an 'and' betwixt every person's name, yet it is not natural or usual to add an 'and' till you come to the last person."

Then in the other case which Mr. Justice *Kay* referred to, *In re Wylde* (4), the gift was to *J. C.* and *C.* his wife and *W. L.*, in equal shares and proportions; there is the conjunction "and" between each of the three persons named, therefore that came exactly within the observations of the Lord Keeper; and the same view is taken by Lord Justice *Knight Bruce*, who says: "For reasons stated in the argument, my conclusion here may possibly be consistent with the cases of *Warrington* v. *Warrington* (5) and *Paine* v. *Wagner*. I am not sure that it is not." So that it is clear he did not consider he was overruling *Warrington* v. *Warrington*. Lord *Cranworth* says: "I confess that I was at first very much struck with the decision of Sir *James Wigram*, in the case of *Warrington* v. *Warrington*, and I felt a difficulty in seeing a distinction between that case and the present. The distinction between it and *Bricker* v. *Whatley* is very fine, as Sir *James Wigram* himself thought. I think, however, that the cases were distinguishable. The ground upon which the Lord Keeper relied in *Bricker* v. *Whatley* was that the use of the word 'and' occurring twice in the enumeration of the legatees, was not the ordinary form of language if it was meant that all the

(1) 1 Vern. 233.
(2) 2 D. M. & G. 724.
(3) 12 Sim. 184.
(4) 2 D. M. & G. 724, 727, 728.
(5) 2 Hare, 54.

four legatees named were to participate equally; therefore it was held, that according to the ordinary construction of a sentence so framed, the word 'and' occurring before the name *Stephen Whatley* and *Hester* his wife, must be taken to mean that the persons following it were meant to take, as if they were one person only, the same interest as each of the legatees previously named, the second 'and' which occurred between the names of the husband and wife being merely a sub-copulative, shewing that the two were to be treated as one person in the distribution of the benefits given, just as they would have been according to *Littleton*, had the case been one of a devise of land. There being, therefore, that distinction between the cases of *Bricker* v. *Whatley* (1), and *Warrington* v. *Warrington* (2), the latter case is not in the way of the application of the original doctrine laid down by *Littleton*."

The only question is whether I ought to take a different view because of the case *In re Jupp* (3).

In that case Mr. Justice *Kay* proceeds to deal with cases in which the words are different from those in *Warrington* v. *Warrington*, professing to follow those cases. I find in those cases the proposition recognised that a slight difference of language is sufficient to prevent the application of the rule of law on which they are founded. Mr. Justice *Kay* decided that case at variance with what I am deciding. But I do not find that *Warrington* v. *Warrington* was referred to by him in his judgment, and he cites two cases as supporting the view he took which I find not only do not support that view but do support the case of *Warrington* v. *Warrington*; which I must follow.

Solicitors for Plaintiffs: *Alfred T. Lawden.*
Solicitors for Defendants: *John Nicholls & Co.*

(1) 1 Vern. 233. (2) 2 Hare, 54.
(3) 39 Ch. D. 148.

D. P.

KEKEWICH, J.

1889

May 23; *June* 1.

CHURCHER *v.* MARTIN.

[1888 C. 1839.]

Charity—Deed void altogether—Voidable—Legal Estate—Charitable Trust—Title by Possession—One of several Trustees barred.

Real estate was by deed expressed to be conveyed to trustees upon charitable trusts. The deed was not enrolled, and the grantor died within a year after the execution of the deed. On his death the trustees named in the deed entered into possession, and applied the rents and profits according to the trusts of the deed:—

Held, that the deed was not voidable only, but was absolutely void under 9 Geo. 2, c. 36, s. 3, and was not valid as conveying the legal estate, and void only as creating charitable trusts:

Held, that the trustees of the deed, having been in possession more than twelve years prior to the commencement of an action against them by persons claiming under the grantor, the action was barred by the *Statute of Limitations*.

One of the trustees was the general devisee and legatee of the grantor:—

Held, that the trustees could not be held mere licensees of the devisee and legatee; and that the accident of his being one of the trustees did not operate to defeat their title.

By an indenture dated the 22nd of January, 1868, and made between *William Thorngate* of the one part, and *Emmanuel Churcher*, *H. Compigné*, and *H. J. C. Martin*, of the other part, *William Thorngate* granted and conveyed unto *Emmanuel Churcher*, *H. Compigné* and *H. J. C. Martin* (the *Thorngate* trustees), all the hereditaments of which *William Thorngate* was seised in *New Zealand* and in the county of *Southampton*, and also certain leaseholds and certain personal estate, upon trust within twenty years to sell the freeholds and leaseholds, and to stand possessed of the proceeds of sale, and of the rents and profits until sale, and of the personal estate, and the interest and dividends thereof, upon trust to apply the sum of £200 per annum in charity for the benefit of such poor persons as the *Thorngate* trustees should think proper, and subject thereto for the benefit of decayed and unfortunate tradespeople who should have attained the age of fifty-six years. And the trustees were to

re-imburse themselves all expenses and retain £100 per annum for their personal expenses, and to make partition with any person or persons.

This indenture was not enrolled, and *William Thorngate* remained in possession of the rents and profits of the property until his death on the 6th of November, 1868. By his will he had devised and bequeathed his real estate and personal estate and all estates vested in him upon trust unto *Emmanuel Churcher*, and he appointed *Emmanuel Churcher, H. Compigné,* and *H. J. C. Martin,* executors of his will.

Immediately after his death the *Thorngate* trustees entered into possession of the property comprised in the deed, and had ever since applied the income according to the trusts of the indenture of 1868.

Henry Compigné died in 1879, and *W. E. Churcher* was appointed a trustee in his stead, and the property was conveyed to *Emmanuel Churcher, H. J. C. Martin,* and *W. E. Churcher,* as new trustees.

Emmanuel Churcher died in 1887, having, by his will, appointed *W. E. Churcher, G. Churcher, G. Bone,* and *G. K. Smith,* the executors, and having devised and bequeathed to them all his estate upon certain trusts.

G. Churcher, G. Bone, and *G. K. Smith* brought this action against *H. J. C. Martin, W. E. Churcher,* and the Attorney-General, claiming a declaration that the charitable trusts declared in the indenture of 1868 were, as to the freehold and leasehold hereditaments, void, as being contrary to the statute 9 Geo. 2, c. 36, and claiming a conveyance and assignment of the hereditaments.

H. J. C. Martin and *W. E. Churcher* denied that the charitable trusts were void, and pleaded that the property had been continuously held by them, *Emmanuel Churcher* and *H. Compigné,* or some of them, for more than twelve years for the purposes of the trusts of the deed of 1868, and pleaded the *Statutes of Limitation.*

Neville, Q.C., and *A. Young,* for the Plaintiffs:—

The Defendants cannot avail themselves of the *Statute of*

KEKEWICH, J. 1889 CHURCHER v. MARTIN.

Limitations, as by their deed they were made trustees of the legal estate, and it is only the trust which has failed, so that there is a resulting trust for the settlor. The deed is not altogether void, as is shewn by the practice of the Court, which has been in such cases to direct a reconveyance of the legal estate: *Seton* on Decrees (1); *Lister* v. *Pickford* (2); *Salter* v. *Cavanagh* (3).

Warmington, Q.C., and *G. B. Freeman*, for the *Thorngate* trustees, *H. J. C. Martin*, and *W. E. Churcher*:—

We rely on our possession, which, if the deed was invalid, is a complete bar. The deed was altogether void under 9 Geo. 2, c. 36, s. 3, and the practice of the Court as to conveyances cannot alter the law, and may have been adopted to save all questions. The form does not appear to have been discussed in the cases cited. What is void is void and cannot be set up: *Magdalen Hospital* v. *Knotts* (4).

A deed of this nature is conditional only, and has no effect if the grantor dies within the year.

In no case has the legal estate been held to pass under a deed void as against the *Mortmain Acts*. It is quite possible to establish a good charity without any deed or by user, and the actual possession has always been held of importance: *Attorney-General* v. *Munro* (5). There may be questions between the possessors and the objects of the charity, but that does not affect other people.

Evidence was then given that the rents and profits had been always received and applied to the charities except as to the £100 per annum.

Ingle Joyce, for the Attorney-General.

Neville, in reply:—

The words of the statute are quite consistent with holding the deed voidable and not void. What else becomes of the legal

(1) 4th Ed. vol. i. p. 587.
(2) 34 Beav. 576.
(3) 1 D. & Wal. 668.
(4) 4 App. Cas. 324.
(5) 2 De G. & Sm. 122, 163.

estate during the year? Is it in suspense, and passes only on enrolment or at the end of the year? Such a state of things was never heard of. In *Magdalen Hospital* v. *Knotts* (1) the deed was absolutely void. All that the statute does is to make the charitable trust void—not the deed. The form given in *Seton* on Decrees was recently followed by Mr. Justice *Kay* in *Martin* v. *Freeman* (2). There is no authority for saying that a trustee who has employed land in charity for twelve years has established a charity. The trust here is express: *Lewin* on Trusts (3); and they can have no title except as trustees. The trustees are the legal owners and have been in possession, and the Court does not inquire in that case under what title they come in, and will hold them trustees. Or in another point of view, they have been mere licensees, and have employed the rents with the assent of the owner, *Emmanuel Churcher*, one of them. That cannot give adverse title.

Warmington referred to *Doe* v. *Wrighte* (4); *Doe* v. *Munro* (5).

1889. June 1. KEKEWICH, J.:—

Judgment was reserved in this case to give me an opportunity of considering the following points.

Plaintiffs and Defendants alike agree that the deed of the 22nd of January, 1868, was, in default of compliance with the statutory provision respecting enrolment, inoperative to create a charitable trust. The Plaintiffs say that although thus inoperative the deed did not fail to pass the legal estate purporting to be conveyed thereby, and they claim under a trust alleged to attach to such legal estate and to result from the failure of the trusts declared by the deed. The Defendants, on the other hand, say that the deed served no useful purpose whatever, and no more passed the legal estate than it declared a charitable trust. This led to a discussion respecting the meaning of the word "void" in the *Statute of Mortmain*, 9 Geo. 2, c. 36, s. 3,

(1) 4 App. Cas. 324.
(2) 58 L. T. (N.S.) 538.
(3) 8th Ed. p. 878.
(4) 2 B. & Al. 710.
(5) 12 M. & W. 845.

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and so to the distinction between "void" and "voidable." But in truth though to treat the deed as voidable might possibly answer the Plaintiffs' purpose, their contention was not that it should be so treated, but that it was void to the extent above mentioned. The point took me by surprise. I have always understood that in the words of *Bayley*, J., in *Doe* v. *Wrighte* (1) "the statute makes void not merely the trust but also the legal estate given," and I should not have hesitated so to hold had not reference been made to what was said to be a settled form of decree in such cases and to a recent decision of Mr. Justice *Kay* approving it. The form of decree is given in *Seton* on Decrees (2) and appears to have been that pronounced in the case of *Wickham* v. *Marquis of Bath* (3), before the Master of the Rolls in November, 1865. That case is reported in Law Rep. 1 Eq. 17, and a perusal of the report does not disclose any direction on the part of the learned Judge that the decree should be framed as it was. The question raised in that case was whether there had not been a colourable evasion of the statute, that is whether there had not been compliance with forms accompanied by departure in substance, and it may well be that those who were concerned in drawing up the decree thought it open to question whether in such a case the legal estate did not pass so as to make a reconveyance desirable if not necessary. Reference to some older authorities might have dispelled this doubt; but be that as it may, the form adopted under the special circumstances of that case could not be accepted as of general application. I take leave to mention in passing that the form is otherwise open to criticism, for it purports to be based on one given at page 583, declaring void a charitable legacy, which is an entirely different matter. The case before Mr. Justice *Kay* was that of *Martin* v. *Freeman*, reported, so far as I am aware, only in the *Law Times* (4). There is nothing in the report to indicate that this point was present to the Judge's mind, and I should conclude that he treated the deed-poll in question as void in the ordinary and proper sense of the word. At the conclusion of the argu-

(1) 2 B. & Al. 721.
(2) 4th Ed. vol. i. p. 587.
(3) Law Rep. 1 Eq. 17.
(4) 58 L. T. (N.S.) 538.

ment he appears to have been referred to the form in *Seton*, and, following that form, to have directed a conveyance to the heir-at-law. There may have been some conveyancing or other reason why this was deemed convenient by the parties before the Court, but I cannot regard the case as an adjudication of the point now falling for decision. My original opinion therefore remains unaffected either by settled form or judicial decision.

The question whether the word "void" may properly be construed as "voidable" does not really arise here, but having been discussed may be conveniently mentioned for the purpose of introducing a case relied on by the Defendants. The question is sometimes one of considerable difficulty. The subject is treated in *Maxwell* on the Interpretation of Statutes (1), where many authorities are cited, and I think it will be found that the cases in which the less strict meaning is allowable may be divided into three classes: 1. Where, as a matter of construction according to ordinary rules, that is the sense of the language used; 2. Where the strict meaning would defeat the Act itself; and 3. Where that strict meaning would be inconsistent with some other statute or some legal principle which there is no apparent intention to disturb. It is for those who support the less strict meaning in any particular case to prove that it falls within one of these classes, or as was said by Lord *Cairns*, in *Magdalen Hospital* v. *Knotts* (2), the onus lies "upon those who would cut down or qualify the effect of these words" (there quoted from the statute 13 Eliz. c. 10, respecting leases of charity lands) "to shew some ground, either from the nature of the case, or from authority, for doing so." It was there held that a lease offending against the statutory provisions was absolutely void, and, distinctions notwithstanding, that case is strong to shew that where alienation of land is declared void unless made in compliance with prescribed forms and conditions it is inoperative for all purposes. In the course of the argument some questions were suggested respecting the application of this rule to the legal estate pending compliance with statutory conditions subsequently fulfilled, but I doubt whether there is any real difficulty in

(1) Cap. 8, sect. 3.

(2) 4 App. Cas. 332.

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them, and there is no occasion to pursue them further now. I hold that the deed of the 22nd of January, 1868, was wholly inoperative and passed no estate or interest either at law or in equity.

Another point arises in this way. It has been proved that shortly after the execution of the deed of the 22nd of January, 1868, the trustees of that deed entered into possession of the property which it purported to convey, and that as regards so much thereof as is claimed by the Plaintiffs in this action the trustees for the time being (not all the same persons throughout) had been in uninterrupted possession for upwards of twelve years before writ issued. It has further been proved that they have been thus in possession on behalf of the charity which the deed purports to constitute, and they say that such charity has been thus established. Into this I need not inquire, because the trustees and the Attorney-General combine in their defence to the action, and no question arises between them; but the application of the money coming to the trustees' hands is nevertheless of importance as regards *Emmanuel Churcher*, who was himself one of them. Apart from that accident, why should not this uninterrupted possession confer a prescriptive title as against the Plaintiffs, who, without tracing the devolution about which there was no contest, may be treated as being the devisees of him who would now be entitled to the property comprised in the deed of the 22nd of January, 1868, had that deed never been executed. The Plaintiffs' answer is that the possession of the trustees is the possession of their *cestuis que trust*, and *Lister* v. *Pickford* (1) was cited. The general proposition is true enough, and might be supported by other authorities, but what is its application to the present case (I will assume that those in possession were trustees in the proper and full sense of the term)? How can the possession of trustees enure to the benefit of him whose title was intended to be defeated by the deed which created the trust? How can the grantor (for *Emmanuel Churcher* may be considered the grantor) be their *cestui que trust*? Because, it is urged, there is an express trust in his favour, an express trust necessarily

(1) 34 Beav. 576.

resulting from the failure of those declared. It would suffice to reply that such a resulting trust is implied by law, and that whatever else it may be it is not an express trust; but as *Salter* v. *Cavanagh* (1) was referred to, I may point out that the trust there spoken of as express was one inferred from the deed, and discoverable on the face of it, and not as here a trust against the deed and due only to the fact that the deed is void. This seems to have been appreciated by the learned author of the text-book which was mentioned.

There is still one argument to be noticed, and one deserving more consideration. "From the date of the deed until his death in 1887 *Emmanuel Churcher* was one of the trustees—one of the persons jointly in possession—and it is said that he cannot be taken to have assisted others in acquiring a title against himself. The law, it is urged, adjudges the possession to be that of him who has the right; and the proper inference is that *Emmanuel Churcher's* co-trustees were in possession with his license, and not adversely to him." If *Emmanuel Churcher* had been the sole trustee the aspect of the case would have been very different, but here he was one of several; receiving rents and performing acts of ownership without the slightest reservation or indication of beneficial claim, and unless I am bound to regard the physical identity of the beneficial owner with one of the trustees as prevailing to the disregard of the facts and substance of the story, I must treat *Emmanuel Churcher* the beneficial owner as excluded from possession for twelve years and upwards, notwithstanding that *Emmanuel Churcher* the trustee took an active part in the management of the estate. Am I so bound? Trustees are not a corporate body; there is no aggregate existence independent of the individual members; but, on the other hand, they are joint owners of the trust property, and they cannot act otherwise than jointly, even though frequently and for many purposes one member of the body represents the others. It seems to me consistent with principle to hold that the joint possession excludes that of any one of the joint possessors on his own behalf, and no authority was cited or has occurred to me inconsistent with that view. My

(1) 1 D. & Wal. 668.

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conclusion, therefore, is that the accident of *Emmanuel Churcher's* beneficial interest did not operate to defeat the title of the trustees which he intended to preserve.

The result is that the Plaintiffs' case wholly fails, and there must be judgment for the Defendants with costs.

Solicitor for Plaintiffs: *A. H. Ewer*, agent for *N. Donnithorne, Fareham.*

Solicitors for Defendants: *Sole, Turner, & Knight*, agents for *Blake & Co., Portsea.*

Solicitors for the Attorney-General: *Hare & Co.*

C. M.

In re MISSOURI STEAMSHIP COMPANY.

[1886 M. 1906.]

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CHITTY, J.
Jan. 30, 31; *Feb.* 28.
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May 1, 2.

Conflict of Laws—Lex Loci contractûs—Intention of Parties—Clause in Contract void by Law of the Country of the Contract—Ship—Bill of Lading—Law of the Flag.

When a contract is made in one country to be performed wholly or partially in another, *primâ facie* the contract is to be construed and enforced according to the *lex loci contractûs*; but the Court will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by positive law.

A contract was made in *Massachusetts, U.S.*, between an American citizen and a British company of shipowners, by which the company undertook to carry certain cattle from *Boston* to *England* in a British ship. The contract contained a clause that the company should not be liable for the negligence of the master or crew of the ship. Such a clause is valid by English law, but void by the law of *Massachusetts* as being against public policy. The cattle were lost by the negligence of the master and crew, and the shipper claimed against the company for the loss:—

Held (affirming the decision of *Chitty*, J.), that the contract itself shewed that the parties intended it to be governed by English law, and that the stipulation exempting the company from liability through the negligence of their master and crew, not being immoral or forbidden by positive law but only void under the law of *Massachusetts* as being against public policy, would be enforced by an English Court: and the claim was dismissed.

THIS was a claim by Mr. *A. N. Munroe*, a citizen of the *United States of America*, residing at *Boston*, in the state of *Massachusetts*, against the *Missouri Steamship Company, Limited*, which was in course of voluntary liquidation, for damages for the loss of 264 head of cattle shipped by him in *America* on board their ship, the *Missouri*.

The *Missouri Steamship Company* was an English company incorporated under the Act of 1862, having its offices in *Liverpool*. The *Missouri* was an English ship, belonging to the port of *Liverpool*.

The cattle were shipped by *Munroe* under contracts in the English form, signed by the agent of the company at *Boston*.

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They each contained the following clause:—"Ship not accountable for the acts of God, the Queen's enemies, pirates, robbers, or thieves, barratry of master or mariners, restraints of princes, rulers or people, loss or damage, mortality or injury resulting from any of the following perils, whether arising from the negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise howsoever, namely accidents to fittings, disease, stress of weather, want of space, air, or water, accidents to condensing apparatus, tanks, or machinery, diminishing or injuring the supply of water or air, risk of craft, explosion or fire in port or at sea, in craft or on shore, before lading or after unlading, breakage of shaft, or any latent defect in hull, machinery, or appurtenances, accidents from steam, machinery, or boilers, or any damage or injury thereto, however caused, nor for collision, stranding, or any other accident or peril of the seas, rivers, and steam navigation, of what nature or kind, howsoever such collision, stranding, or other accident or peril may be caused." In each of the bills of lading there was a similar stipulation.

The *Missouri* sailed from *Boston* on the 17th of February, 1886, and was wrecked on the coast of *Carnarvon* on the 1st of March, and the cattle were drowned. For the purposes of the claim it was admitted that the cargo was lost through the negligence of the master and crew.

The liquidator contended that the claim was barred by the clause in the contract set forth above. In answer to this, the claimant contended that the contract must be governed by the law of *Massachusetts*, according to which any special contract exempting a common carrier from responsibility for the negligence of himself or his servants was null and void. Evidence of the law of *Massachusetts* on this point was given by the Claimant.

The claim came on for hearing before Mr. Justice *Chitty* on the 30th of January, 1888.

Cohen, Q.C., and *F. Thompson*, for the liquidator:—

The law of the country to which the ship belongs must prevail: *Lloyd* v. *Guibert* (1); *The Gaetano and Maria* (2); *Peninsular and*

(1) Law Rep. 1 Q. B. 115. (2) 7 P. D. 137.

Oriental Steam Navigation Company v. *Shand* (1); *Robinson* v. *Bland* (2); *Jacobs* v. *Crédit Lyonnais* (3); *Pope* v. *Nickerson* (4); *The Halley* (5); *Steele* v. *State Line Steamship Company* (6); *Carr* v. *Lancashire and Yorkshire Railway Company* (7); *Holman* v. *Johnson* (8); *Potter* v. *Brown* (9); *Branly* v. *South-Eastern Railway Company* (10).

Sir *Walter Phillimore*, Q.C., and *Carver*, for the claim:—

The law of the country where the contracts were made must prevail: *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (11); *Dalrymple* v. *Dalrymple* (12).

[The following American cases were cited in the course of the argument: *Railroad Company* v. *Lockwood* (13); *Mynard* v. *Syracuse Railroad Company* (14); *Spinetti* v. *Atlas Steamship Company* (15).]

CHITTY, J.:—

This is a claim by Mr. *Munroe* against the *Missouri Steamship Company, Limited*, for damages for loss of his cattle. Mr. *Munroe* is a citizen of the *United States* domiciled there. The company is an English company incorporated according to English law, domiciled in *England*, and now in voluntary liquidation. The contracts were made at *Boston, Massachusetts*, where the company had an agent by whom the contracts were entered into on their part. The ship on which the goods were to be carried was the *Missouri*, a British ship, and one of a line of steamships trading regularly between *Boston* and *Liverpool*. The contracts were for the carriage of the cattle from *Boston* to *Liverpool*, and they contained express stipulations exempting the shipowners from liability for loss or damage arising from negligence of the master or crew, and they provided that bills of lading should be given

(1) 3 Moo. P. C. (N.S.) 272.
(2) 2 Burr. 1077.
(3) 12 Q. B. D. 589.
(4) 3 Story, 465.
(5) Law Rep. 2 P. C. 193.
(6) 3 App. Cas. 72.
(7) 7 Ex. 707.
(8) Cowp. 341.
(9) 5 East, 124.
(10) 31 L. J. (C.P.) 286.
(11) 10 Q. B. D. 521.
(12) 2 Hagg. Cons. 54.
(13) 17 Wallace, 357.
(14) 71 N. Y. Rep. 180.
(15) 80 N. Y. Rep. 71.

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containing stipulations to the same effect. The company's agent had no authority to bind the company by any contract not containing such stipulations as those which were actually inserted. The cattle were shipped on board at *Boston*, and bills of lading were given and accepted there in conformity with the contracts. The ship sailed and was stranded on the Welsh coast. It is admitted for the purposes of the present case that the stranding occurred through the negligence of the master and crew. In these circumstances it is clear, as admitted by the Claimant's counsel, that he is not entitled to recover if these stipulations, exempting the shipowners from liability arising from the negligence of their servants, are valid. But it is contended for the Claimant that the stipulations are invalid according to the law of the state of *Massachusetts*, where the contracts were in fact made and the bills of lading given and accepted.

There was no substantial contest before me as to the present state of the law in *Massachusetts* on the subject. According to that law the stipulations are invalid. The ground upon which the decision at present stands is that the stipulations by which a common carrier endeavours to exempt himself from the consequences of the negligence of himself and his servants, are considered to be extorted by the carrier without any real assent on the part of the person sending the goods, and are void as being contrary to public policy. In *The Brentford City* (1) these principles were held to apply in favour of the shipper at *Boston* of cattle on board a British vessel for carriage to *England*, where the facts were substantially the same as those in the present case. The law in the *United States* on this subject, however, appears not to be finally settled. The question is apparently pending in the Supreme Court in the case of *The Montana* on appeal from the Circuit Court. The Supreme Court has given leave to the appellants to adduce evidence to shew what is the English law on the subject. The arguments have been concluded and the judgment has been reserved. But as after inquiry I am unable to ascertain that some considerable time may not elapse before the judgment is given, and as it is not clear that the judgment will determine the point, I have not thought it right to postpone

(1) 29 Federal Reporter, 373.

any longer my decision. Should the judgment of the Supreme Court be in favour of the shipowner on the validity of the stipulation, Mr. *Munroe's* claim must fail.

I proceed, then, to consider the question on the assumption that according to the law of *Massachusetts* the stipulations are void. The question to be determined is whether the law of *England* or the law of *Massachusetts* ought to be applied to the stipulations which purport to exempt the shipowners from liability for negligence.

For the Claimant it is argued that the question, being a question as to the validity of the terms of the contracts, ought to be determined according to the law where the contracts were made. For the shipowners, on the other hand, it is argued that the question ought to be determined according to the law of the country to which the ship belongs. As the stipulations in the contracts and the bills of lading are identical there is no occasion to treat these documents separately.

Now the question does not relate to the formal validity of the contracts, and the question raised by the Claimant does not go to the validity in matters of substance of the contract as a whole. So far as relates to all matters of form the contracts are valid according to the law of both countries. So far as relates to all matters of substance the rest of the contracts would, if the stipulations attached had not been inserted, stand valid according to the law of both countries. Further, the stipulations are not impeached on the ground that they are of a criminal or wicked or immoral nature, or such as ought not to be permitted according to the law of civilized countries; they are impeached solely on the ground that they are void, as being disallowed by the law of the place where the contracts were made, which law considers them contrary to its own views of the public policy that ought to prevail within the limits of its own territorial jurisdiction. Although the law of *Massachusetts* would in the case of a contract made in *Massachusetts* by a common carrier for the carriage of goods wholly within the territories of the state hold these stipulations void, I cannot find any sufficient reason for saying it would hold them void in the case of a contract made within the state for the carriage of goods where the performance of the

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contract was (as in the case before me) to take place mainly outside the state, if it were declared expressly on the face of the contract that for all purposes the contract was to be governed by the law of the country to which the ship belonged, and the law of such country allowed the stipulations to be valid. In other words, I apprehend that the law of *Massachusetts* would not prohibit the parties to such a contract from contracting expressly with a view to the law of *England*: see Lord *Mansfield's* judgment in *Robinson* v. *Bland* (1) and *Story's* Conflict of Laws (2).

The contracts before me do not contain any such express declaration. But I have examined and endeavoured to ascertain the precise nature of the objections raised, with this result, as it appears to me, that it was within the competence of the parties according to the law of both countries to enter into the contracts.

Two cases of high authority were relied upon by the company's counsel in support of their contention: *Lloyd* v. *Guibert* (3) and *Peninsular and Oriental Steam Navigation Company* v. *Shand* (4). The actual decisions in those cases may not precisely govern the present case, but the question is whether the principle upon which those decisions are based does not apply.

It is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention.

Numerous instances of the exceptions are to be found in the books. A different intention, that is an intention to be bound by some other law than the law of the place where the contract is made, may be inferred from the subject-matter of the contract and from the surrounding circumstances, so far as they are relevant to determine the character of the contract: see the judgment of Mr. Justice *Willes* in *Lloyd* v. *Guibert* (5). The terms and stipulations found in the contract itself are matters of importance to be taken into consideration as to the true inference to be drawn. The general principle by which the Court of Exchequer

(1) 2 Burr. 1078.
(2) Pages 280, 281.
(3) Law Rep. 1 Q. B. 115.
(4) 3 Moo. P. C. (N.S.) 272.
(5) Law Rep. 1 Q. B. 122, 123.

was guided in the solution of the question as to what law ought to prevail was that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have intended, to bind themselves, and by the steady application of that principle the Court arrived at the conclusion that where the contract of affreightment does not provide otherwise than as between the parties to such contract in respect of sea-damage and its incidents, the law of the ship should govern. In that case the ship was a French ship, the contract was made at a Danish West-Indian port, and the goods were shipped to *Hayti* to be delivered at *Havre, London,* or *Liverpool,* at the charterer's option. The Court held that the law of *France* applied, whereby the shipowners on abandonment of the ship and freight were exempt from any liability to the owner of the cargo, and rejected the law of *Denmark* and the various other countries put forward on behalf of the owners of the cargo. In the course of the judgment the various places in which the contract was to be performed were pointed out; but in adopting the French law the Court relied on the subject-matter of the contract, the employment of a sea-going vessel for a service the greater and more onerous part of which was to be rendered on the high seas, where for all purposes of jurisdiction, criminal and civil, with respect to all persons, things, and transactions on board, she was, as it were, a floating island, over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which even when in a foreign port was never completely removed from French jurisdiction. These practical considerations formed the main ground of the judgment. The Court declined to enter into any question as to the policy of the French law.

I have referred somewhat fully to this judgment in order to shew that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable and ought to be applied not merely to questions of construction and the rights incidental to, or arising out of, the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinctions founded on the difference of these questions were not rested on substantial ground, and would lead to uncer-

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tainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simple, natural, and consistent rule (1).

In *Lloyd* v. *Guibert* (2) there were no express stipulations pointing to the law of the country rather than to the law of some other country, but in *Peninsular and Oriental Steam Navigation Company* v. *Shand* (3), where also it was held that the contract was governed by the law of the flag, there were such stipulations, and Lord Justice *Turner*, in delivering the judgment of the Privy Council, inquired into the actual intention of the contracting parties as disclosed on the face of the contract. In that case the contract was made between British subjects in *England* substantially for safe carriage from *Southampton* to *Mauritius*. The performance was to commence in an English vessel in an English port, to be continued in vessels which, for this purpose, carried their country with them, to be fully completed in *Mauritius*, but liable to breach, partial or entire, in several other countries in which the vessel might be in the course of the voyage. Into this contract there was introduced a stipulation professing to limit the liability of the shipowner, which stipulation was valid according to the law of *England*, but invalid according to the law of *Mauritius*. In discussing the intention of the parties the Lord Justice asked, in substance, whether it was contended that the stipulation should be construed according to the English law, which would give effect to it, or according to the French law, or some other law, which would give no effect to it, and he held that the actual intention of the parties must be taken clearly to have been to treat the contract as an English contract, to be interpreted according to English law, and that there was no rule of general law or policy setting up a contrary presumption, and consequently that the Court below was wrong in not governing itself according to those rules. Now the difference in fact between that case and the present is that in that case the parties were both British subjects, and the contract was made in *England*,

(1) Westlake's Private International Law, 2nd Ed. p. 201.

(2) Law Rep. 1 Q. B. 115.

(3) 3 Moo. P. C. (N.S.) 272.

whereas in the present case one only of the parties is English, and the contract was made in *Boston*. But these differences, though proper to be taken into consideration on the general question, have little or no bearing on the question of the intention of the parties to be inferred from the particular stipulations.

In determining a question between contracting parties (to quote from the judgment in *Lloyd* v. *Guibert* (1)), recourse must first be had to the language of the contract itself and, force, fraud, and mistake apart, the true construction of the language of the contract is the touchstone of legal right. The circumstance that the stipulations which the Claimant asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country, affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed and not to the law which disallowed the stipulations. It is unreasonable to presume that the parties inserted in the contracts stipulations which they intended should be nugatory and void. But on the facts of this case a more limited proposition may be adopted. The loss occurred through the negligence of the shipowner's servants within the territorial waters, not of *Massachusetts*, but of *Wales*, that is, of a country where English law prevails. Conceding that it would be possible (without saying it would be reasonable) to presume that the parties contracted with reference to the law of *Massachusetts* in respect of any loss by negligence occurring within the territorial waters of that state, it appears to me that it would be unreasonable to presume that they contracted with reference to the law of that state in respect of a loss by negligence occurring outside the limits of that state.

I hold, then, that the stipulations are valid, first, on the general ground that the contracts are governed by the law of the flag, and secondly, on the particular ground that from the special provisions of the contracts themselves it appears the parties were contracting with a view to the law of *England*.

G. M.

From this judgment the Claimant appealed.

C. A.

The appeal came on to be heard on the 20th of June, 1888, but

(1) Law Rep. 1 Q. B. 120.

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the hearing stood over to await the decision of the *Montana Case* in the Supreme Court of the *United States.*

The case came on again on the 1st of May, 1889, when a printed copy of the judgment in the *Montana Case* was produced to the Court, from which it appeared that the stipulation in question was held by the Supreme Court to be void as being contrary to public policy.

Sir *H. Davey*, Q.C., Sir *Walter Phillimore*, Q.C., and *Carver*, for the Appellant:—

The question is whether this contract is to be governed by the law of *Massachusetts*, by the federal law of the *United States*, or by the law of *England.* When this case was before the Court of Appeal on the 20th of June, 1888, it was admitted that indisputably a stipulation exempting a common carrier from liability for loss arising from the negligence of himself, or his servants, was invalid according to the law of *Massachusetts.* It was considered that the federal law was the same, but the point was not settled, and, as a case was pending before the Supreme Court in which the point arose, the Court of Appeal thought it desirable to wait till that case was disposed of. The Supreme Court has now decided in the case of the *Montana* that by federal law as well as by the law of *Massachusetts* such a provision is void on grounds of public policy.

[On counsel proceeding to read the judgment of the Supreme Court in that case,

LORD HALSBURY, L.C., said:—We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions of our own Courts, is wrong. Among other things it involves an inquiry, which often is not an easy one, whether the law of *America* on the subject in which the point arises is the same as our own.

FRY, L.J.:—I also have been struck by the waste of time occasioned by the growing practice of citing American authorities.

COTTON, L.J.:—I have often protested against the citation of American authorities.]

In the present case the contract was made in *America*. The *loci solutionis* were several. The cargo was (1) to be received on board in American waters; (2) to be transported on the high seas; (3) to be delivered in *Liverpool*. We say that according to the English authorities, the "nature, obligation, and interpretation" of a contract are determined according to the *lex loci contractûs*, unless it was made with reference to some other law. It is not easy to say what "nature" means, but the expression is used by high authorities. Obligation and interpretation seldom arise separately, so the three words are usually grouped together.

[FRY, L.J.:—Suppose a contract made in *Boston* to carry goods from *London* to *Liverpool*, would such a stipulation as that inserted here be void?]

That, we submit, is a difficult point, and one the decision of which would not govern the present case. In *Peninsular and Oriental Steam Navigation Company* v. *Shand* (1) it was held that a contract made in *England* between English subjects for one to carry the other from *England* to *Mauritius*, was governed by English law, not by the law of *Mauritius*, and *Turner*, L.J., in his judgment puts this in a strong light (2).

[FRY, L.J.:—If you find in a contract, one of the parties to which is English, a stipulation which is valid according to the law of *England*, but not according to the law of the country where it is made, is not that evidence that the parties intended to contract according to English law?]

It is, no doubt, some evidence to that effect.

[LORD HALSBURY, L.C.:—If a contract to be performed in *America* contained a stipulation that it should be governed by English law, such a stipulation might well be void, but if the contract was not to be wholly performed there, and different laws might touch it, is the stipulation necessarily bad?]

In *Robinson* v. *Bland* (3) the conflict of jurisdiction did not really arise, but in W. Bl. p. 259, is a passage frequently quoted

(1) 3 Moo. P. C. (N.S.) 272. (2) 3 Moo. P. C. (N.S.) 291.
(3) 1 W. Bl. 257; 2 Burr. 1077.

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which does not occur in *Burrow*: "The general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract." In *Quarrier* v. *Colston* (1) the legality of a loan for gaming purposes was treated as depending on the law of the country where it was made. In *Lloyd* v. *Guibert* (2) it was decided that the law of the country to which the ship belongs is to govern a contract of affreightment unless the contract provides otherwise. That case shews that the law of the country where the goods are to be delivered is not the law that is to govern the transaction. Then we say that *Peninsular and Oriental Steam Navigation Company* v. *Shand* (3) shews that the *lex loci contractûs* governs unless it be shewn that the parties intended to be governed by another law. The law of the place of completion is eliminated by *Lloyd* v. *Guibert*, and the case must be governed by the *lex loci contractûs* or by the law of the flag. In that case it was held that the law of the flag should govern, but that went on the particular circumstances of the case, and is expressly treated, p. 122, as an exception from the general rule. The question there was as to interpretation not as to legality. The law of the flag cannot be generally applied—it might do in the case of a homogeneous country like *France*, but as to *America* there is no law of *America*—each state has its own law. In the present case too much weight must not be attributed to the fact of the stipulation being good according to the law of one country and bad according to that of another, as shewing by what law the parties intended to contract. It was quite uncertain till the recent decision whether the stipulation was bad according to federal law. In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (4), where the contract was for conveyance from an English port to a Dutch port, and was made with an English merchant, it was held that the contract must be treated as English, the persons for whose benefit the ship was employed being English, and the port of inception being English. In *Jacobs* v. *Crédit Lyonnais* (5) the contract was

(1) 1 Ph. 147.
(2) Law Rep. 1 Q. B. 115.
(3) 3 Moo. P. C. (N.S.) 272.
(4) 10 Q. B. D. 521.
(5) 12 Q. B. D. 589.

entered into in *London* between Englishmen for a cargo from *Algiers*, which contract was to be completed by shipment by the defendants at *Algiers* on board the plaintiff's vessels. It was held that the contract was to be dealt with according to the law of *England*, and that therefore an insurrection, which according to the law of *Algeria* would have been a defence against a claim for failure to ship, was not a defence. All these cases start with this—that the *lex loci contractûs* is to govern unless there is something to shew a contrary intention. Where the contract is wholly to be performed in another country, the law of that country may govern, but there is no case to shew that the law of another country in which part of the contract is to be performed can be the governing law. Take the case of a shipment at *Calcutta* which is to call at *Queenstown* or *Falmouth* for orders to sail to any place on the Continent. The law of numerous countries may affect the transaction, but it cannot be supposed that the law of any of those counties is to govern.

[FRY, L.J.:—The clause is put in for the relief of the shipowner. The natural *forum* for attacking an English shipowner is *England*. Ought not the English law to govern?]

In one sense the natural *forum* is *England*—but any country in which the ship can be seized may be considered a natural *forum*. In *Pope* v. *Nickerson* (1) it is laid down that a contract to be performed in another country is invalid if bad according to the law of the country where it is made.

[LORD HALSBURY, L.C.:—All the cases go on the footing that what law is to govern depends on a variety of circumstances. Among these we must consider the place which the parties must be supposed to have regarded as the place where a remedy for a breach of the contract would be sought.]

That turns upon intention. We do not make intention our main ground of argument. We rely on the obligation created by the contract where it was entered into. *Lee* v. *Abdy* (2) is a strong instance of the *lex loci contractûs* being held to govern.

Cohen, Q.C., and *F. Thompson*, for the liquidator:—

The company is protected by the stipulation exempting them

(1) 3 Story 465, 484. (2) 17 Q. B. D. 309.

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from liability for the negligence of the master and crew. That clause is valid by English law, and ought to be enforced here: *Carr* v. *Lancashire and Yorkshire Railway Company* (1). The ship was a British ship, and the law of the flag ought to prevail. But independently of that rule the English law must prevail in this case, for it is clear from the terms of the contract that the parties intended it to be governed by English law. The *lex loci contractûs* is never held to prevail where the parties intended some other law to govern the contract: *Kay* v. *Wheeler* (2); *Jacobs* v. *Crédit Lyonnais* (3). The contract was not to be performed in *America*, but in this country, where the cattle were to be delivered; the ship and the shipowners were English, and the mere introduction of the stipulation in question shews that the parties wished to be governed by English law. That being so, the construction and validity of the contract are to be governed by English law: *The Gaetano and Maria* (4). The Appellant contends that the shipowners owed temporary allegiance to the country in which they were, and therefore could only make a contract which was valid by its laws. If that be so, no contract made in one country could be enforced in another country unless the laws of both countries were exactly the same. There is no authority for such a contention, and the result would be absurd. It has always been held that a contract made in one country can be enforced in another although the laws are different. It would be otherwise if the stipulation was immoral, or criminal, or forbidden by positive law, but that is not the case here, it is only considered against public policy, and the American Courts refuse to enforce it. The Appellant is altogether in a false position, he is not merely defending himself, but he is setting up the contract, and at the same time he asserts that one of the clauses is void; he is seeking to enforce a contract which does not exist. If the whole contract is void, he cannot enforce it; if it is not void, it must be governed by English law. The Appellant is asking the English Court to administer the municipal law of a foreign country: *Story's* Conflict of Laws, arts. 281, 299, 535; *The Halley* (5); *Potter* v. *Brown* (6).

(1) 7 Ex. 707.
(2) Law Rep. 2 C. P. 302.
(3) 12 Q. B. D. 589.
(4) 7 P. D. 137.
(5) Law Rep. 2 P. C. 193.
(6) 5 East, 124.

Sir *W. Phillimore*, in reply:—

If the contract is entirely void the Claimant can recover under the common law of carriers, and the company are liable for negligence. But we say that the special clause only is void, and that the contract can be enforced without it. That is the effect of the American law, and there is nothing remarkable in that. But the company are asking the Court to enforce a stipulation which the American law says cannot be enforced: *Huber* v. *Steiner* (1).

LORD HALSBURY, L.C.:—

In this case, from the peculiar mode in which the question arises, and from the fact that there are no pleadings, but simply a claim fortified by an affidavit, the question has been somewhat obscured by reason of the absence of definiteness which such a form of procedure necessarily involves. But, in substance, it is an action on a contract entered into between these persons. I say "persons" advisedly, though one of them is an incorporated company. The question is, whether, upon familiar principles, a contract entered into at *Boston* for the carriage of cattle to *England* and subject to certain stipulations, is one which, when the English Courts are applied to, is to be enforced according to the law of *England*, or whether the English Courts will decline to enforce it, because, if the question had arisen in the *United States*, the *United States* Courts would have declined to give effect to one of the stipulations in the contract.

I confess I have been somewhat surprised at the lengthy elaboration of principles which I should have thought by this time had been so far accepted as part of the English law that it was not necessary to enter into so elaborate a consideration of them. That one country will, under some circumstances, enforce contracts made in another, is a proposition I should have thought not requiring authority, and it lies at the foundation of the whole of this argument that when a contract is made between two persons in one country to be performed in another, one of the considerations which according to all writers is to be regarded is what the contract itself contemplated as the law which was to

(1) 2 Bing. N. C. 202.

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regulate the contract. Sir *Walter Phillimore's* argument, pushed to its extreme, appears to me to come to this, that no such question ever ought to have arisen, and that each country should have refused to enforce a contract made in another country, unless the laws of both countries were identical. For a proposition so absurd in its terms Sir *Walter Phillimore* of course would not contend.

It seems to me that it is impossible to approach this question without recognising the fact that there may be stipulations which one country may enforce and which another country may not enforce, and that in order to determine whether they are enforceable or not you must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract. I put aside, as Sir *Walter Phillimore* candidly put aside, questions in which the positive law of the country forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it. Nor does Sir *Walter Phillimore* contend that the contract now in dispute is a contract coming within that category. But, assuming for the moment that the law which the parties contemplated as the law of the contract is one which can prevail—and for that not only is there a very considerable body of English authority, but the very judgment which is invoked here as the judgment to which we are to bow, recognises the fact that the validity of this contract, if the law of the contract is to be the law of *England*, may be affected by the intention of the parties, or, more strictly speaking, the intention of the parties as seen through the contract—it would seem to leave the only question to be determined, the question what was the law which the parties contemplated as being the law governing this contract.

Now this is a contract for the conveyance of cattle from *Boston* to *England* by sea on board a British ship by a British company whose domicil is in *England*. Those circumstances, though very strong, would perhaps not be conclusive. But when I look at the contract itself and find that the ordinary exceptions to the bill

of lading are the Queen's enemies and so on, it is absolutely impossible to resist the conclusion that the parties did contemplate being governed by English law in their contracting relations. If I am to assume that the law of the *United States* is that this particular stipulation now in dispute is of no validity in the *United States* and cannot be enforced, when I find that both the parties to the contract make this stipulation a part of the contract into which they enter which is of validity in *England* and can be enforced, and cannot be enforced in the *United States*, it seems to me to follow irresistibly that the contract relations into which the parties entered were such that they intended to be governed and regulated by English law; and if that is so the question is free from doubt.

I do not propose to enter into the question whether or not the American judgment in the *Montana Case* is in all respects satisfactory. It is enough for me to say that whatever be the American law, assuming always that it is outside the category to which I have before referred, the law which the parties have elected as the law of their contract makes this stipulation valid. It is not necessary to advert to the principle that the Claimant here is endeavouring to enforce a contract in this country, and seeking to enforce in this country the jurisprudence of another country by which the parties did not intend to be bound, and to have recognised in the Courts of this country a system of jurisprudence different from its own.

I confess I have not been able during the very long and elaborate arguments of this case to entertain the least doubt on the question which has been the subject of so much discussion. I am of opinion that the judgment of Mr. Justice *Chitty* ought to be affirmed and the appeal dismissed with costs.

COTTON, L.J.:—

I entirely agree, and I should hardly have added anything to what the Lord Chancellor has said but for the fact that the case has been discussed on behalf of the Appellant with great learning and elaboration and at great length.

This is a claim made against this company for loss of cattle which were shipped in the *United States* under and in consequence

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of a contract entered into between the shipper and the steam company, which is the company being wound up. That contract contained a clause which, if it can be relied on, exempts the company from all liability in respect of the loss for which the Appellant claims. It has been decided by English law, for reasons which I think are satisfactory, that this is a valid stipulation, and good to exempt the company from liability in a case like this. Then what is relied on? The American law; and we have to consider first of all what law is to be considered in dealing with this contract. A vast number of cases were referred to by the Appellant to shew that here we could not rely on any law except the law of *America*, or rather of the place, *Boston*, where this contract was entered into. In my opinion that is not what the American judgment in the *Montana Case*, which has been referred to, nor what the cases which we ought to consider authorities, namely English decisions, have laid down. What they have laid down is this, that *primâ facie* the law of the country where the contract is made will govern the contract, decide what its incidents are, decide what its true construction is and its validity, but that the Court must look at the circumstances of the case, and from them may come to the conclusion that the contract is to be governed by the law of some other country; and all the cases come to this, that you cannot lay down any distinct positive rule as to what will be the governing law but you must consider, having regard to the nature of the contract and all the other circumstances, by what law the contract is to be governed. I will not repeat what the Lord Chancellor has said as to the reasons for the opinion we have formed that the contract in the present case must be considered as one to be dealt with by the law of *England*.

That being so, the only question is this, whether there is anything in the American law which prevents us giving effect to this contract as it stands. The case relied on was the case of *The Montana*, a decision of the Supreme Court of the *United States*, and that decision comes to this, not that the contract is void, but that this particular clause in the contract is one which they consider contrary to public policy and which they will disregard when they enforce the contract, that is to say, they will enforce

the contract without giving any effect to the clause, which, in this case, if the clause had been valid *in toto*, would have protected the company from liability. That I think is very clear from various passages in the judgment. On page 4 of the printed copy of the judgment, the Court says: "We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt himself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship." That is the only question they consider, and they come ultimately to the conclusion that it is contrary to public policy that that stipulation should be enforced, and they say, in winding up that part of the case: "This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the country where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." What the American Courts were considering was this, that this clause was contrary to public policy, not that there was anything in the law of the *United States* which would prohibit a carrier from entering into such contracts or make it a criminal offence to do so—but simply that it was contrary to public policy, the result of which would be that the American Courts would not enforce it. As the Lord Chancellor has said, I do not enter into the question what will be the result where parties have made in *America* a contract which they intend to be governed by English law, when according to the American law such a contract would be itself illegal. In my opinion no such point arises here. The result of the decision in the case of *The Montana* is simply this, that for the purposes of public policy adopted in the *United States* they consider that this clause ought not to be enforced. In my

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opinion, we are not bound, when a contract is entered into with reference to English law, to abstain from acting on that contract simply because in the case I have mentioned the American Courts, when the contract was entered into in the *United States*, would not enforce it, considering, which the Courts of the country do not consider, that the course they take is in accordance with public policy. I may state that, in my opinion, that judgment as regards the rejection of this clause because it is contrary to public policy does not apply to a contract where the Court comes to the conclusion as a matter of fact that the law to be applied, and which the parties must be considered to have known would be applied, is the law, not of the *United States*, but of another country.

In my opinion the judgment of Mr. Justice *Chitty* was right, and the appeal fails.

FRY, L.J.:—

The principles on which this case has to be decided have been familiar to the Courts at any rate since the time of Lord *Mansfield*, who in the case of *Robinson* v. *Bland* (1) expounded those principles of law, and they have been clearly stated since in many cases, among others in the well-known case of *Lloyd* v. *Guibert* (2), where the learned Judge who delivered the judgment of the Exchequer Chamber, said: — "It is, however, generally agreed that the law of the place where the contract is made, is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance"—and he goes on to enumerate instances from which the Courts have gleaned a different intention. That view of the law was fully adopted in the case of *Jacobs* v. *Crédit Lyonnais* (3) in this Court.

I think, therefore, the general principle on which we have to proceed is one which admits of no doubt; and the inquiry, therefore, is this: looking at the subject matter of this contract, the

(1) 2 Burr. 1077. (2) Law Rep. 1 Q. B. 115, 122.
(3) 12 Q. B. D. 589.

place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract? By that I mean to determine its validity and its interpretation.

Now, in the first place, the ship was an English ship; the owners were an English company; *England* was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place; and, what is still more important, the forms of the contract and the bills of lading were English forms. According to the law of *England*, the contract would be good in the terms in which it stood; whereas according to the law of the *United States* important terms of the contract would be excluded from it. That is, to my mind, a very cogent consideration to shew that what must be presumed to have been the intent of the parties was this—that the law which would make the contract valid in all particulars was the law to regulate the conduct of the parties. Looking at all the circumstances of the case, I have no doubt that that is the conclusion which we ought to arrive at.

In coming to that conclusion, and in stating those principles, I am glad to find that I am in entire accordance with the law laid down in the American Courts. It appears to me that the passages cited from Mr. Justice *Story* are strong in favour of the principle to which I have referred, and in the case of *The Montana* that rule was adopted in express terms by the Supreme Court of the *United States*. Lord Justice *Cotton* has read one passage from that judgment, and I will read another: "This Court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view;" and in that very case, in accordance with the principle so laid down, the Supreme Court proceeded to inquire whether there were any circumstances from which they ought to presume any other law than that of the place where the contract was made to

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have been presumed by the parties. Therefore, it is obvious in adopting the principles which I have stated we are proceeding not only according to the English law, but also according to the law of *America*. It is very desirable, if possible, that the law relating to the interchange of comity between nations should be the same.

There was only one other argument put forward to which I need refer, and it seemed to me to be a little halting between two statements. Sir *Walter Phillimore* laid down a proposition to this effect, that whenever the law of the place where the contract is made prohibits a particular stipulation in a contract no other country can treat that stipulation as valid. If by the word "prohibit" he means that the law of the *United States* has in terms prohibited or has rendered illegal or criminal the introduction of this stipulation, it appears to me that the decision in *The Montana Case* shews that that is not the law of the *United States*. That decision, I think, when fairly read, shews what one would expect to be the case, namely, that the Courts have held that this stipulation being obnoxious to their public policy is void, not illegal, exactly in the same way as in this country we hold that stipulations which are in restraint of trade are not illegal, and that the entering into them does not constitute an illegal conspiracy, but they are void. If, on the other hand, it be argued that where the law of the place of the contract refuses to enforce a stipulation, then no other country will enforce that stipulation, we have a proposition which on the face of it appears to me to be untenable. Therefore, whichever is the alternative of the proposition which Sir *Walter Phillimore* adopts, neither of them will support his case.

I think, therefore, the decision of Mr. Justice *Chitty* was correct, and that this appeal fails.

Solicitors: *Robins, Cameron, & Kemm*, agents for *Bateson, Bright, & Warr, Liverpool; Rowcliffes, Rawle, & Co.*

M. W.

In re BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY.
Ex parte GRAHAM.

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June 6.

Company—Winding-up—Proof for Arrears of Rent-charge—Land in Possession of Liquidators.

An unregistered company were mortgagees in possession of land subject to a rent-charge created by deed. The company was wound up under the 203rd section of the *Companies Act*, 1862, and the liquidators for some time paid the rent-charge. Then, finding that the annual value of the property was not equal to the rent-charge, they obtained leave from the Court to get rid of the land, and gave notice to the tenant in occupation of the land and to the owner of the rent-charge that they repudiated the land. The owner of the rent-charge claimed to prove in the winding-up for arrears which had accrued since the repudiation :—

Held, that the company were only liable so long as they were owners of the land; that the liquidators had sufficiently repudiated the ownership of the land, and that no subsequent claim could be made for the rent-charge.

Thomas v. *Sylvester* (1) explained and followed.

THIS was an appeal from a decision of Sir *H. F. Bristowe*, Vice-Chancellor of the County Palatine of *Lancaster*, in the winding-up of the *Blackburn and District Benefit Building Society*.

By an indenture dated the 20th of June, 1872, the Rev. *P. Graham*, for the consideration therein mentioned, conveyed a piece of land at *Over Darwen*, in the county of *Lancaster*, to the use that an annual rent-charge of £59 2*s.* 9*d.* should be paid thereout to the vendor his heirs and assigns by equal half-yearly payments with power of distress and entry in case of default in payment, and subject thereto to the use of *Joshua Leach* and *John Leach* in equal shares as tenants in common in fee. And the indenture contained covenants by *Joshua* and *John Leach* for themselves their heirs and assigns for punctual payment of the rent-charge. The purchasers subsequently conveyed the land subject to the rent-charge to the *Cotton Hall Brick and Pipe Company*, who on the 25th of March, 1875, mortgaged it in fee to the *Blackburn*

(1) Law Rep. 8 Q. B. 368.

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and District Building Society. The *Cotton Hall Brick and Pipe Company* was wound up in 1878, and the liquidator disclaimed all interest in the equity of redemption. The building society were in possession of the land as mortgagees. On the 1st of May, 1880, the building society made a lease of the land to *Wray* for five years, who underlet it to *Grimes.*

On the 23rd of July, 1881, a petition was presented in the Palatine Court on which an order was afterwards made for winding-up the building society as an unregistered company; and on the 21st of February, 1882, an order was made in the winding-up for vesting all the assets of the society in the official liquidators. Rent was paid by *Grimes* to the liquidators till May, 1885, when the lease to *Wray* expired; and the rent-charge was paid by the liquidators till the same time. But on the 17th of June, 1885, the liquidators, finding that the income derived from the property was not equal to the rent-charge, obtained an order from the Court to the effect that the official liquidators should be at liberty to assign the plot of ground to any person for any or no consideration, or to quit possession upon such terms as they should deem advisable.

The liquidators accordingly gave notice to *Grimes,* and to Mr. *Graham,* that they renounced the possession and all interest in the land, and they entered into negotiation with Mr. *Graham* for a reconveyance of it to him, which he agreed verbally to accept, but no written agreement was entered into, nor was any conveyance to him made. Mr. *Graham* died on the 7th of May, 1887, and on the 8th of September, 1887, the liquidators conveyed the land for a nominal consideration to a person named *Clough.*

On the 26th of September, 1887, the executors and trustees of Mr. *Graham's* will put in a distress on the land and recovered £50, part of the rent-charge which was then due. In January, 1888, they brought an action against the liquidators personally for the balance of the rent-charge, but the action was stayed by the Court of Queen's Bench: *Graham* v. *Edge* (1). The executors then carried in a claim for the balance of rent-charge from the 1st of November, 1885, to the 8th of September, 1887,

(1) 20 Q. B. D. 538, 683.

amounting to £89 10*s.*, which was disallowed by the Registrar; and the question having been brought before the Vice-Chancellor on the 24th of January, 1889, he affirmed the decision of the Registrar. From this decision the executors appealed.

Buckley, Q.C., and *T. Clarkson*, for the Appellants:—

The company were liable at the time of the commencement of the winding-up for the rent-charge, and they must continue liable until they have conveyed the land to some other person. The company having been wound up under sect. 203 of the *Companies Act*, the liquidators have no power to repudiate the land; they can only come to the Court for leave to get rid of it. But, until it is actually conveyed, the company is liable. If the landowner were an individual, an action could be brought against him in debt; and, the landowner being a company, the proper way of enforcing the debt is by a claim. The covenant to pay the rent-charge runs with the land, and if it does not there is privity of estate between the owner of the rent-charge and the landowner, which will support the action until the landowner has got rid of the land: *Austerberry* v. *Corporation of Oldham* (1). The company had not done this when the arrears of the rent-charge accrued. It is not sufficient for the liquidators to give notice to the owner of the rent-charge that they repudiate the land: *Thomas* v. *Sylvester* (2); *Lillingston's Case* (3); *Whitaker* v. *Forbes* (4); *Macfarlane's Claim* (5). At the commencement of the winding-up there was an obligation upon the company for future payments of rent-charge within the 158th section of the *Companies Act*, which includes all claims present or future, certain or contingent. We are entitled to make a claim, and to prove for each payment as it becomes due: *In re Haytor Granite Company* (6); *Horsey's Claim* (7); *In re Gartness Iron Company* (8); *Gooch* v. *London Banking Association* (9).

Neville, Q.C., and *Snow*, for the liquidators, were not called on.

(1) 29 Ch. D. 750.
(2) Law Rep. 8 Q. B. 368.
(3) 7 Rep. 38 a.
(4) 1 C. P. D. 51.
(5) 17 Ch. D. 337.
(6) Law Rep. 1 Ch. 77.
(7) Ibid. 5 Eq. 561.
(8) Ibid. 10 Eq. 412.
(9) 32 Ch. D. 41.

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Ex parte GRAHAM.

LORD ESHER, M.R.:—

In this case there is an appeal from a refusal by the Vice-Chancellor of the Palatine Court to admit a claim for proof for arrears of rent-charge due to the Claimant. The claim to prove was made, not at the commencement of the winding-up of the company, but at a much later period, the arrears of rent-charge having become due during the winding-up. I cannot help thinking they brought it as a claim, which was not due at the commencement of the liquidation, but had become due during the liquidation. But both here and before the Vice-Chancellor they have put it either in that view or in the alternative, namely, that there was a claim existing at the commencement of the winding-up which could have been valued at that time.

We must first consider what the claim was for. It was for a rent-charge reserved on the conveyance of freehold property. As a matter of fact, at the commencement of the winding-up all the rent-charge then payable had been paid, and there was none in arrear. But it is said that there was then a claim against the assets of the building society in respect of these arrears within the meaning of the *Companies Act*. That depends upon what is meant by a claim. It must, of course, mean a legal claim resting on something in the nature of a liability or obligation. Therefore the question resolves itself into this—was there any liability or obligation with regard to the rent-charge at the time of the commencement of the winding-up? It was contended, on the authority of *Thomas* v. *Sylvester* (1), that the claim could be made, because the liability for the rent-charge was a debt. But that case did not decide anything of the sort. All that was decided in that case was that it was a claim arising out of an interest which a tenant has in the possession of land and in the profits of the land at the time when the rent-charge became due. It was so far a right in respect of the enjoyment of the land, that before the passing of the *Common Law Procedure Act* it was the subject of a real action which was not brought on contract, but on a right arising out of the land; and it was held that when real actions were abolished another remedy, namely an action of debt, was left, otherwise the owner of the rent-charge would be left without

(1) Law Rep. 8 Q. B. 368.

any legal remedy. But the Court did not say that the rent-charge itself was a debt; for an action of debt was not confined to what was properly a debt, but might be brought for anything that had become payable from a person before action brought, as in the case of an action for a penalty under an Act of Parliament. In the case to which I have referred, *Quain*, J., says (1): "If a man comes into possession of land as tenant in fee, he is the pernor of the profits of the land, and was liable to a real action for the non-payment of a rent-charge created by a former tenant in fee; if this be so, since real actions are abolished, an action of debt will lie." Therefore they say it is an action arising out of the possession of land, and that any pernor of the profits was liable to an action. In that case the rent-charge had become due while the defendant was in possession as tenant in fee.

In *Whitaker* v. *Forbes* (2) the same question was considered. There the action was brought for a rent-charge due when the action was brought, but it was out of land in *Australia*. It was contended that the action would not lie, because the venue was not here but in *Australia* where the land was. If the liability was on contract the venue would be transitory; therefore the question was whether the liability arose out of the possession of the land or out of contract. It was held that the liability arose out of the possession of the land, and that the action could not lie in *England*. I said in that case (3): "In an action of debt the venue is *primâ facie* transitory, but I think that though that is so we are bound by the authority of the decisions cited in the note to *Thursby* v. *Plant* in *Wms. Saunders* (4), to hold that in some actions of debt the venue is not transitory, as for instance in actions for penalties. There the statute makes the venue local, but the note is also authority for saying that where there is no contract or covenant, but the debt only arises by reason of privity of estate, that is to say, when the liability depends on the defendant's being in possession of the estate charged and not on privity of contract, then the venue is local, and the action must be brought in the locality where the land is situated." And so it was held by the Court. Therefore that case is our authority for saying that a

(1) Law Rep. 8 Q. B. 372.
(2) Ibid. 10 C. P. 583.
(3) Law Rep. 10 C. P. 585.
(4) Sir E. V. Williams' Ed. p. 308.

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claim to recover a rent-charge arises not out of contract but out of privity of estate. There are authorities for saying that if a person who did not create the rent-charge and had not contracted to pay it was in possession of the land out of which it issues, he is liable for breach of duty in not paying it while he is in possession of the land, but unless he was in possession while the rent-charge became due there is no claim against him. If, therefore, at the commencement of the winding-up there was no rent-charge due, the company are not guilty of any breach of duty in respect of such rent-charge; they had not covenanted to pay it, and there was no obligation on their part to pay anything towards it. Their only liability was if they were in possession of the land when the rent-charge became due. I have no doubt, therefore, that there was no claim on the company at the commencement of the winding-up within the meaning of the Act. It must be a claim arising out of a liability recognised by the law.

Then, was there any liability on the liquidators after the commencement of the winding-up? It was said that they had taken possession of the estate for the benefit of the liquidation, and that as they had taken the benefit of the estate they must be bound by its burdens. In one sense they may be said to have taken the estate, because they could not help taking it; but they went to the Court to ask for its direction to get rid of it, and the Court gave them leave to get rid of it. Then they went to the owner of the rent-charge, and told him that they did not mean to keep the land because it was worth nothing. It was contended that the liquidators were in possession of the land through their tenant; but they went to him and told him that he was no longer their tenant. They could not have done more to shew their intention of giving up possession, and they received no profit from it. The Vice-Chancellor had found as a fact that they had given up possession. He says: "How can I find that they kept possession of the estate and were in receipt of the profits when they did all they could to get rid of it?" I agree with his conclusion. The consequence is that there being no liability at the commencement of the winding-up and no liability established by what was subsequently done by the liquidators, it is impossible for the Appellants to prove for the arrears in the winding-up.

The Vice-Chancellor was therefore right, and his order must be affirmed. I may add with respect to the case before *Bacon*, V.C., that it depended on Scotch law and does not govern this case.

COTTON, L.J.:—

The land which is subject to the rent-charge in this case was originally conveyed to two persons named *Leach*, who covenanted to pay the rent-charge, and the land was subsequently conveyed to the company which is now being wound up. The liability of the company entirely depends upon the possession of the land, although the original purchasers may still be liable on their covenant. By an order made in the winding-up, the land was vested in the liquidators. The owner of the rent-charge brought an action against the liquidators personally, but it was stayed by the Court of Appeal without prejudice to a proof being brought in under the winding-up. The only question now is whether the owner of the rent-charge can prove against the company. We ought to allude to another question, whether there is any claim against the liquidators as for a sum to be paid in full on account of their having held and enjoyed the property since the commencement of the winding-up. The circumstances appear to me to prevent any claim on the liquidators. They obtained an order to get rid of it at any time. They went to *Grimes* and then to *Graham*, and told them that they would have nothing more to do with it, and wished to reconvey it.

Then we come to the real question, whether there was any debt at the commencement of the winding-up. It is a claim on an insolvent company in consequence of the legal title in the land being vested in the liquidators. Undoubtedly an action for debt may be brought against the terre tenant for a rent-charge. That was decided in *Thomas* v. *Sylvester* (1). It is not that there is any charge on them on account of their holding the land, but only that when the land is vested in any one he contracts a liability to pay the rent-charge while he holds the land. Here, no doubt, the liquidators were in possession of the estate, but the question is whether there was any beneficial holding. It was contended that it comes within sect. 158, but that section only

(1) Law Rep. 8 Q. B. 368.

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relates to such obligations as are existing at the commencement of the winding-up. Cases were cited to shew that it was not necessary that this should be the case, and that this was such a claim as could be proved under the section. It is only necessary to refer to *In re Haytor Granite Company* (1). There there was a lessee who had covenanted to pay rent. It was an obligation by contract existing at the commencement of the winding-up. That was only estimated by calculating what amount the company would become liable to under the covenant. There was a liability for what was contracted to be done before the winding-up. Then there was the case before Vice-Chancellor *Bacon*, *In re Gartness Iron Company* (2). In that case the company were assignees of land in *Scotland* which was subject to feu duties, and the Court treated the company as having entered into a contract to pay the feu duties. That case has no bearing on the present. It appears to turn on the contractual relations between the parties: if that is not the true explanation of the decision I do not think this Court is bound to follow it. I do not think any of the cases cited justify the Court in admitting this claim. At the commencement of the winding-up there was no obligation on the society to pay anything in respect of this rent-charge.

Another point put to the Court was that the covenant to pay the rent-charge ran with the land. The decision in *Thomas* v. *Sylvester* (3) is against that contention: for there the Judges evidently did not think that the covenant ran with the land, for they decided the case upon the question whether the owner of the rent-charge could sue the assignee as terre tenant in an action of debt.

In my opinion there is no reason for differing from the Vice-Chancellor and the appeal must be dimissed.

FRY, L.J.:—

I am of the same opinion. The principal arguments which the Appellants have addressed to us are two. They say either that there was a debt or obligation at the date of the commencement of the winding-up; or that since the commencement of the

(1) Law Rep. 1 Ch. 77. (2) Law Rep. 10 Eq. 412.
(3) Law Rep. 8 Q. B. 368.

winding-up the company have enjoyed the benefit of the land and must take the burden of the rent-charge payable out of it. As to the first point, there was no contract between the company and the owner of the rent-charge; the only right which the Appellants could have against the company must have arisen out of the pernancy of the profits by the company when the rent-charge accrued due. It was said that the covenant for payment of the rent-charge was one which ran with the land. I agree that the persons who are assignees of the land incur liability for the rent-charge while in possession of the land, but not otherwise. Therefore the first ground fails.

As to the second ground, namely, that the company entered into the beneficial enjoyment of the land, the facts of the case expressly exclude this argument. They did not enjoy the land, and the liquidators did all they could to get rid of that portion of the land. This ground, therefore, also fails. The appeal must be dismissed.

Solicitors: *Costeker, Over Darwen; Danger & Neville, Liverpool.*

M. W.

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[1888 S. 680.]

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Trustee—Investment of Trust Money—Option to take wrong Investment—Liability for wrong Investment—Appeal—Service on Third Party—Rules of Supreme Court, 1888, *Order* LVIII., *r.* 2.

U., a trustee, who had power to invest on real security, invested on a mortgage of freehold houses, with power of sale, a larger sum of trust money than was justifiable. He afterwards retired from the trust, and transferred the mortgage to the new trustees. The security proving unproductive, the new trustees, with the privity of the Plaintiff, who was a purchaser of a share in the trust funds, but without any notice to *U.*, sold the mortgaged property at a considerable loss, but it was not established that the sale was unfair or improvident. The Plaintiff then sued *U.* for the loss:—

Held, by *Kekewich*, J., that a trustee who makes an improper investment is entitled, upon making good the trust fund, to have the investment returned to him; that the Plaintiff and the new trustees were therefore not justified in selling the property without notice to *U.*, so that he might

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have an option of replacing the trust fund and taking to the mortgage, that *U.* therefore was not liable, and that the action must be dismissed:—

Held, on appeal, that an investment on a security of a description authorized by the trust, where the breach of trust consists only in not exercising due caution in taking it, stands on an entirely different footing from an investment of an unauthorized description, which the *cestuis que trust* must either accept or reject; that the mortgage here became part of the trust estate, that the *cestuis que trust* could not therefore be under any obligation to *U.* to give him notice whether they accepted or rejected it; that the new trustees had a right to realize as they did without notice to *U.*, and that he was liable for the deficiency.

A third party who has been served by a defendant under Order XVI. and has obtained leave to appear at the trial, is not a person directly affected by an appeal by the plaintiff within the meaning of Order LVIII., r. 2, and need not be served by the plaintiff with notice of the appeal; but the defendant, if he desires him to be served, ought to obtain leave of the Court to serve him.

ELIZA SALMON died in 1841, leaving a will of which *Uppleby* and *Fox* were the trustees and executors. She bequeathed to them her personal estate upon trust to invest in parliamentary stocks or funds, or on real securities in *England* or *Wales*, with power to vary investments. The trusts were for *Annette Bower* for life, and then to such of her children as should attain twenty-one or marry.

Annette Bower had six children, all of whom attained twenty-one. *Fox* died in 1845.

In 1881, *Uppleby*, the surviving trustee, sold out the Government stocks held upon the trusts of the will, and on the 18th of July, 1881, invested out of the proceeds £1300 on a mortgage in fee of thirteen small freehold houses in *Kingston-upon-Hull*, with a power of sale.

Before taking this mortgage, *Uppleby* had the property valued by a local valuer of reputation, who valued them at £1750. They were not all finished at the time of the mortgage, and were let at weekly rents.

In 1877, *Augustus E. Bower*, one of the six children, had mortgaged his sixth share to the Plaintiff, subject to two prior mortgages which were shortly afterwards got in by the Plaintiff. On the 10th of November, 1883, *A. E. Bower* released the equity of redemption to the Plaintiff.

On the 15th of November, 1884, *Uppleby* retired from the trusts,

and under a power in the will appointed *Charles U. Bower* and *Thomas Bower*, two of the sons of *Annette Bower*, trustees, and duly transferred the £1300 mortgage to them.

By indenture dated the 17th of November, 1884, Mr. and Mrs. *Bower*, and four of their sons, viz., *Thomas Bower, C. U. Bower, F. S. Bower*, and *Augustus E. Bower* (the other two children being then infants), released *Uppleby* from all claims in respect of the trust estate, and it was further witnessed that the father and the four sons (the father also covenanting on behalf of *Annette Bower*) "do and each of them doth hereby for himself, his heirs, executors, and administrators, and according to his estate and interest in the premises, but not further or otherwise," covenant with *Uppleby* that the covenanting parties would indemnify him from all actions which might be brought against him as executor, and from all costs which he might incur on account of any acts, deeds, or proceedings in relation to the trusts.

On the 14th of May, 1887, the new trustees sold the mortgaged property by auction under the power of sale in the mortgage deed for £840, leaving £820 net after deducting the costs of sale.

In February, 1888, the Plaintiff commenced this action, claiming a declaration that the investment of the £1300 was a breach of trust, that *Uppleby* might be ordered to replace the stock which he had sold out to make the investment, or otherwise to make good the loss to the estate, and that upon his replacing the stocks the investments of the £820 might be transferred to him.

Uppleby by his defence denied the insufficiency of the security, and stated that the Plaintiff had been fully informed of the investments before he purchased *Augustus Bower's* share. He alleged that the sale was made by the new trustees with the privity and at the instigation of the Plaintiff and without any previous notice of it to him (*Uppleby*), and that he never had the option given him of taking over the security on his paying the amount secured by it. He further alleged that the sale had been improvidently made, and that the property would readily have found a purchaser at £1500 if proper means to effect a sale had been taken, and that if the sale had been properly and reasonably conducted, there would have been no loss to the trust estate. He further

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set forth the deed of the 17th of November, 1884. Shortly before delivering his defence, he served upon his co-Defendants, *C. U. Bower* and *T. U. Bower*, and on the two other children of *Annette Bower*, who were parties to the last-mentioned deed, one of whom was the personal representative of *Annette Bower's* husband, a third party notice that he claimed to be indemnified by them against liability. These four parties put in a statement of defence, and a counter-claim against *Uppleby* to have the deed of the 17th of November, 1884, set aside or rectified.

As regards the Plaintiff's knowledge of the state of the investments before he took the release of the equity of redemption of *Augustus Bower's* share, it appeared that on the 29th of January, 1883, the Plaintiff's solicitor wrote to *Uppleby's* solicitor, asking whether the trust estate still consisted of the same particulars, viz., £1162 18*s.* 11*d.*, and £904 6*s.* 3*d.* consols, and £2000 on mortgage. On the following day, *Uppleby's* solicitor replied that the Bank Annuities had been sold for £2000, which had been invested "£1300 on freehold houses at *Hull*, belonging to Mr. *Sanderson*, the mortgage being dated 18 July, 1881, and £700 on mortgage of land at *Dalby* in this county by deed dated 9 September, 1882." It did not appear that the Plaintiff had any further information when he took the release.

As regards the allegation that the sale was made at the instigation of the Plaintiff, it appears that on the 13th of April, 1887, the solicitor of the *Bower* family wrote to the Plaintiff's solicitor stating that he understood that *Augustus E. Bower* had assigned his interest to the Plaintiff. He went on to state that the £1300 mortgage had turned out a bad security, that the trustees had entered into receipt of rents which would not keep down the interest, and that they proposed to offer the property for sale. He asked to have the Plaintiff's views on the subject. The Plaintiff's solicitor replied asking for some further information. On the 19th of April the *Bower* solicitor wrote giving further particulars as to the state of the property, and said it seemed best to offer it for sale by auction. The writer expressed his opinion that to invest £1300 on such a property was unjustifiable, and concluded, "Mr. *Uppleby* is a very wealthy man, and my clients would be glad to make him liable. We see no alter-

native but to offer the property, unless you can suggest some other course." The Plaintiff's solicitor replied on the 22nd of April, "As we presume there is no prospect of the property in question improving in value, we presume the best course will be to offer it for sale by public auction." He then asked what was the date of the release, and said that on receiving a reply he would consider whether he could suggest anything. No further communication respecting the sale appeared to have taken place between the *Bower* solicitor and the Plaintiff's solicitor.

That the sale took place without any notice to *Uppleby* was not disputed.

The action was tried by Mr. Justice *Kekewich* on the 22nd and 23rd of February, 1889.

S. Hall, Q.C., and *P. F. Stokes* for the Plaintiff:—

This mortgage was a clear breach of trust. On their own valuation it was an advance on cottage property beyond two-thirds of the value.

Warmington, Q.C., and *J. G. Wood*, for the Defendant *Uppleby*:—

Assuming the investment was irregular, the Plaintiff was a party to the sale. Our contention is, that it is not competent for a person who intends to make a trustee liable for a breach of trust to deal with the trust estate, and to put it in such a position that the trustee, whose default is going to be made the subject of liability, cannot get it on restoring the trust funds. And then a forced sale was had with depreciatory conditions. We object to the expressions, "at a nominal reserve to close a trust," and "the property will be sold a bargain." That these had their effect, is shewn by the fact that the purchaser resold the property the next day at a profit of £100, and that the present purchaser will not part with it under £1400.

Hall, in reply:—

The Defendant cannot complain of our having sold the property. A trustee who is party to an initial breach of trust is liable for all the consequences. Even if we knew and approved of the sale, there is no authority that the trustee is entitled to

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the original security on making restoration: *Seton* on Decrees (1), *Knott* v. *Cottee* (2), *Francis* v. *Francis* (3), *Gibbins* v. *Taylor* (4), *Clough* v. *Bond* (5).

KEKEWICH, J.:—

The point which I have to decide is admittedly free from express authority, and it is raised most distinctly in the statement of defence, so that there can be no doubt about what the pleader meant. The point arises in this way. Mr. *Uppleby*, the trustee of this will, made in 1881 an investment of part of the trust money, namely, £1300, on a mortgage of some real estate —houses—and I assume for the purposes of the question now under consideration that that was an improper investment. He retired from the trust while that mortgage was still belonging, in form, at least, to the trust estate, and he was a party to the appointment of new trustees and made over the trust property to them. If the mortgage had been realized by the new trustees in the ordinary course of their duty without the intervention of the Plaintiff, Mr. *Uppleby* could not have escaped liability. But as a matter of fact it was not sold in that way. What happened was this. The trustees proposed to realize this mortgage, which was then known to be an insufficient security for the money advanced upon it. The Plaintiff had purchased the share in reversion of one of the *cestuis que trust*, and was then entitled to an interest in this and other investments of the trust funds. The solicitor of the trustees communicated with the Plaintiff, as such assignee, with reference to the realization. Correspondence extending over some period followed, and I take the letters of the Plaintiff, or rather of his solicitor, as amounting to this: "By all means sell this property. It is an investment which ought never to have been made, and we shall lose money, but the best thing is to sell." It was sold, and at a considerable loss, and the Plaintiff seeks now to make Mr. *Uppleby*, the retired trustee, liable for all the loss. Is he entitled to do that? In order to answer that question I must consider what is the position of a trustee who has made an improper investment.

(1) 4th Ed. vol. i. p. 466.
(2) 16 Beav. 77.
(3) 5 D. M. & G. 108.
(4) 22 Beav. 344.
(5) 3 My. & Cr. 490.

I might take it from many authorities, but I happen to have before me, in the case of *Knott* v. *Cottee* (1), a statement which seems to me directly applicable. The Master of the Rolls there, speaking of how a trustee ought to be made liable who has made an improper investment, says (2): "The case must either be treated as if these investments had not been made, or had been made for his own benefit out of his own moneys, and that he had at the same time retained moneys of the testator in his hands." That seems to me to exactly express the position of a trustee who has made an improper investment. *Quâ* trustee he has not made the investment at all. True it is that the trust estate is short of so much money, and that that has been put into some investment, but it is not a trust investment, and the trustee is liable to make that money good out of his pocket. That is his liability. He is treated as not having made an investment at all, and as therefore having in his hands money belonging to the trust estate which he is liable to pay, and he is ordered to pay. He is entitled to reply "Yes, but there is standing in my name, or in the names of others, the property which was purchased with the trust estate. You say I improperly used the trust estate for that purpose, and, if you make me replace that money, I am entitled to have the property which I purchased with my own money, which was supposed to be trust estate at the time, but which, by the judgment of the Court, is held to be my own money, and I am entitled to that property for my own benefit." That has always been held to be the right of the trustee if he replaces the trust estate. On the other hand, the Court, administering justice between trustees and *cestuis que trust*, has said, "Yes, but we will keep our finger on that property until you have made good the trust estate, and the *cestuis que trust*, tracing their trust property into this improper investment, are entitled to a lien upon it to make good the trust property." Those are the correlative rights of trustee and *cestuis que trust* when the question of improper investment comes before the Court. I do not think the *cestuis que trust* are entitled to say, "We will sell the property which you improperly purchased and charge you the difference without giving you the chance of,

(1) 16 Beav. 77. (2) 16 Beav. 79.

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so to speak, redeeming, that is to say, paying back or restoring the trust property, and, in that event, of taking that which you have improperly purchased." That seems to me the principle of equity applicable to this case. As I have pointed out, the Plaintiff was a party to the sale, and he did not take any steps to give Mr. *Uppleby* that option which I think he was entitled to. He knew that Mr. *Uppleby* was alive; he knew that Mr. *Uppleby* was a man of means; he knew that he intended, if there was a loss, to make Mr. *Uppleby* responsible for that loss; and, although I do not suppose for a moment that it occurred to either him or his solicitor, I think he was bound to give Mr. *Uppleby* the option, and to tell him, "Now we are going to sell this property. We believe it will realize a loss. Are you prepared, as a trustee who has been guilty of a breach of trust, to take the property and make the trust estate good?" I think he ought to have given him that option. I think that, not having given him that option, he cannot now say that Mr. *Uppleby* is responsible for the loss which, for aught I know, would never have occurred. I think, therefore, that on this point the Plaintiff's case fails, and must be dismissed with costs as against Mr. *Uppleby* and the new trustees.

Neville, Q.C., and *D. Sturges*, for the parties appearing under the third party notice:—

We ask for our costs either from the party who has served us with the notice, or from the Plaintiff. The Court has a discretion in the matter: *Yorkshire Waggon Company* v. *Newport and Abercarne Coal Company* (1). Under the circumstances we ought to have our costs in any event. The Defendant *Uppleby* brought us here unnecessarily. If we had not appeared to the third party notice we should have admitted our liability to indemnify him. We therefore appeared, and he then applied to the Court for directions under Order XVI., r. 52, and the order was made under which we pleaded.

KEKEWICH, J.:—

The Defendant *Uppleby* is attacked and sought to be made liable for an improper investment, and he says: "There are

(1) 5 Q. B. D. 268.

certain other persons who have executed a deed of indemnity to me with reference to this particular investment. I must tell them, otherwise I may be in this difficulty, that I may be beaten (which is an event I must contemplate), and then I should have to sue them and try the whole case over again. Therefore I tell them I mean to fight, and if they like to come and assist me, or to take it out of my hands by admitting the indemnity, they may. At any rate I give them fair notice under the order." I do not say that he is not to do that. They think it right to come. They do not trust him, but would rather be present and watch. From a prudent point of view no doubt they are right. They do come, and then the Defendant succeeds, and the third parties then say: "But you have brought us here, and though you have succeeded and therefore there is no indemnity, you must pay our costs." I do not think that is the meaning of the rule. I do not think the intention of the rule is that third parties should be brought in as defendants against whom a claim is made in any event, but as defendants against whom a claim is made in a contingent event which the party giving the notice of course knows, as also they know, may not occur. I do not think that I can make either the Plaintiff or the Defendant pay these costs. The result is that the third parties will have no costs.

H. L. F.

The Plaintiff appealed from this judgment.

C. A.

1889. May 13. When the appeal was opened

Warmington, Q.C., and *J. G. Wood*, for the Defendant, took the preliminary objection that the Plaintiff had not served the third parties with notice of the appeal, as being "directly affected" by the appeal within Order LVIII., r. 2.

S. Hall, Q.C., and *P. F. Stokes*, for the Plaintiff:—

So far as we are concerned, our notice of appeal is right; but if the Court should consider that the third parties ought to have been served, then the Defendant should have given the notice, first obtaining leave to do so under rule 2 of Order LVIII., by analogy to the practice under rule 11 of Order XXXVI., which provides that notice of trial may be given by the plaintiff "or

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other party in the position of plaintiff,"—in this case the Defendant. If the Defendant desired the presence of the third parties on the appeal, he should himself have served them with notice of appeal. The judgment of the Court below does not deal with the third parties at all, and therefore it was unnecessary for the Plaintiff, in appealing from that judgment, to serve any notice on them. If the Respondent, the Defendant, intends to contend that the judgment should be varied so as to affect the third parties, then he should have given the third parties notice of his intention, under rule 6 of Order LVIII.

LORD ESHER, M.R.:—

In this case the Defendant to the action brought in third parties alleging that the latter had agreed to indemnify him, and he desired that the liability of the third parties to him might be tried at the same time as the question between himself and the Plaintiff, so that if he were held liable to the Plaintiff he might insist on his rights against the third parties. It is stated that at the trial the third parties desired to cross-examine the Plaintiff's witnesses, but Mr. Justice *Kekewich* refused to allow this to be done, saying that he would try the case as between the Plaintiff and the Defendant first, and as between the Defendant and the third parties afterwards. If the learned Judge meant that he would try the question of the liability of the Defendant to the Plaintiff over again as between the Defendant and the third parties, he was in my opinion going contrary to the intention of the *Judicature Acts* and the third party rules. However, in the result he found for the Defendant as against the Plaintiff, and if that judgment stands, the third parties will be relieved from liability. But the Plaintiff has appealed, and if on that appeal the Plaintiff should succeed against the Defendant, the question between the Defendant and the third parties will arise again, and thus the position of the third parties might be made less favourable by the result of this appeal. In that sense the third parties are interested in the appeal. On the opening of the appeal the Defendant took the objection that the third parties had not been served by the Plaintiff. What is the position of the Plaintiff? He does not care whether the Defendant has a

remedy over against any third parties; but the Defendant's point is that the Plaintiff ought to have served the third parties, though he had no interest in their being here. The question must really depend upon the construction of rule 2 of Order LVIII. Having regard to rule 1 of the same order I think the Appellant, who is the Plaintiff in the present case, is the person who ought to serve the notice of appeal in all cases coming within rule 2. But the rule does not say that the notice is to be served on all parties affected by the appeal; it is only to be served on all parties "directly affected." It must be remembered that the rule applies to all Divisions of the High Court, and it ought not to be construed with reference to the former practice of the Court of Chancery. In the Common Law Courts there never could have been such a thing as the introduction of a third party. It would not be right to construe the rule as if the word "directly" were not in it, and then to apply the old rules in Chancery under which all parties interested were served. I do not think that a third party brought in on the ground that he has undertaken to indemnify the defendant can be said to be "directly affected" by the appeal. The appeal, if successful, would not determine the whole case against him, but only one point in the case. Therefore, though with some doubt, I have come to the conclusion that the third parties are not directly affected by this appeal, and consequently the objection fails.

I think, however, that the Court ought not in the exercise of its discretion to hear the appeal without the presence of the third parties. The Defendant, who wanted to have them here, ought to have applied to the Court of Appeal under the latter part of the rule for leave to serve them. If the Defendant should now make the application the Court will be ready to assist him, but, as the presence of the third parties is wholly immaterial to the Plaintiff, and is solely for the benefit of the Defendant, the Defendant ought to pay the costs of the adjournment, on the ground that he ought to have made the application before.

COTTON, L.J.:—

I differ from the Master of the Rolls, except on the point that the third parties ought to be present when this appeal is argued

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and decided. It is necessary in order to carry out the intention of the third party rules that the third parties should be present when the Court decides, if it should so decide, that the Defendant is liable to the Plaintiff. The Plaintiff accuses the Defendant of a breach of trust; the Defendant denies his liability, but says that if he is liable the third parties have agreed to indemnify him. The order giving the third party liberty to appear at the trial must mean the trial between the Plaintiff and the Defendant. It was said that Mr. Justice *Kekewich* refused to allow the third parties to cross-examine the Plaintiff's witnesses. If the counsel for the third parties desired to cross-examine the witnesses upon the question of indemnity which was to be tried afterwards between the Defendant and the third parties, I think that the Judge was right in refusing to allow it. But Mr. Justice *Kekewich* seems to have made use of some expressions which might be construed to mean that he must try the whole case over again between the third parties and the Defendant. That would defeat the intention of the third party rules. The third parties had liberty to appear at the trial, and, in my opinion, if they wished to cross-examine the Plaintiff's witnesses on the question whether the Defendant was liable to the Plaintiff, they were entitled to do so, and Mr. Justice *Kekewich* would have been wrong in refusing to allow them to do so. I do not think the learned Judge intended to do that. The rules contain no direction as to the defendant serving the third party with notice of the trial between the plaintiff and the defendant. It is for the plaintiff to make his action perfect, and it is his duty to serve all persons who ought to be present at the trial. In the present case the Plaintiff was unsuccessful at the trial, and he appealed. The judgment at the trial entirely swept away the case of the Plaintiff against the Defendant, and with it the case of the Defendant against the third parties. On the hearing of the appeal, subject to the rule of the Court as to hearing only two counsel on each side, the counsel for the third parties would have the same right to bring forward any point in favour of the Defendant against the Plaintiff as they had at the trial. Then who is to make the third parties appear? It is the duty of the Appellant to make his appeal perfect, and there being no rule requiring the Respondent to serve a third

party, I think it is the duty of the Appellant to do so. I doubt whether rule 2 of Order LVIII. refers to third parties at all. The third party procedure was new in both divisions of the Court, and in the absence of any rule the Court must be guided by this principle, that it is the duty of the Appellant to make his appeal perfect. But if rule 2 applies to third parties, I think the third party is "directly" affected by the appeal, for the judgment of the Court below has destroyed all foundation for the claim of the Defendant against him and the appeal may possibly restore it. The Court of Appeal ought not to decide the question of indemnity, as it has never yet been tried; but it may send it back to the judge to be tried.

With respect to the costs caused by this objection, I think that they ought to depend on the result of the appeal.

FRY, L.J.:—

I agree with the Master of the Rolls as to this preliminary objection. Two questions arise in this action: first, whether the Defendant is liable to the Plaintiff; secondly, if so, whether the third parties are liable to indemnify the Defendant. The first question affects the third parties, only through the intervention of the right of indemnity. Therefore, I think, the third parties are only indirectly affected by the appeal by reason of the Defendant's rights against them. The language of rule 2 is emphatic: it not only says that the notice of appeal is to be served on all parties directly affected, but it adds that it shall not be necessary to serve parties not so affected. I think the proper course was for the Plaintiff to serve the Defendant, who was directly affected by the appeal, and then the Defendant if he wished to retain his rights over against the third parties should apply to the Court of Appeal for leave to serve them. The scheme of the rules appears to me to be to make the proceeding against the third party an independent proceeding in which the Defendant is to be the actor.

The Defendant then asked for leave to serve the third parties, which the Court granted on the terms of the Defendant paying the costs of the adjournment of the appeal.

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1889. June 18, 19. *S. Hall*, Q.C., and *P. F. Stokes*, for the Appellant:—

The investment was improper. It was insufficient in value, on the face of the valuation. It is true that the Plaintiff knew the money was invested in freehold cottages, which were within the trust; but he had no means of knowing their value. It was not his duty to see to the sufficiency of the investment; the responsibility was on the trustee: *Macleod* v. *Annesley* (1); *Fry* v. *Tapson* (2); *Smethurst* v. *Hastings* (3); *In re Olive* (4); *Life Association of Scotland* v. *Siddal* (5). With respect to the sale, we contend that the Defendant *Uppleby* was not relieved from liability by the sale. A *cestui que trust* who has a claim against his trustees for an improper investment does not lose his personal remedy against the trustee by parting with his lien on the investment: *Francis* v. *Francis* (6); *Knott* v. *Cottee* (7); *Ex parte Norris* (8). It was not the Plaintiff's duty to interfere and stop the sale.

Warmington, Q.C., and *J. G. Wood*, for the Defendant *Uppleby*:—

The Plaintiff knew of the investment at the time when it was made. He also knew of the sale, and approved of it. By putting it into the power of the new trustees to sell the security, he prevented *Uppleby* from getting the benefit of it, and in fact adopted it as part of the trust property. Admitting the security to be improper, the beneficiaries might have said to us, "either sell this property and make good the loss, or pay us the sum invested and take to the security;" but we say that they cannot take to the property and sell it behind our back and then prove for the deficiency. When trust money is improperly invested the *cestuis que trust* have a right to say we will ratify this investment, in which case it becomes trust property, and the trustee is subject to no liability for making the investment, or to say, we repudiate this investment; the property is not ours, but we have a lien upon it for the trust money which has gone into it, sell it and

(1) 16 Beav. 600.
(2) 28 Ch. D. 268.
(3) 30 Ch. D. 490.
(4) 34 Ch. D. 70.
(5) 3 D. F. & J. 58.
(6) 5 D. M. & G. 108.
(7) 16 Beav. 77.
(8) Law Rep. 4 Ch. 280.

make good the deficiency. *Thornton* v. *Stokill* (1) establishes this view. Here the trustees sold under the mortgage title, they had, therefore, accepted the property as trust property, and the Plaintiff concurred in their selling. There was then no right left to complain of the impropriety of the investment.

[FRY, L.J.:—Has any case gone further than this, that the trustee may replace the trust fund, and then say—give me the investment? Is there any case which makes an offer to give him up the investment on his replacing the trust fund a condition precedent to the right to sue him?

COTTON, L.J.:—*Thornton* v. *Stokill* was a very different case from this. The investment there did not purport to be an investment according to the terms of the trust.]

There is no case where an investment has been realized behind the back of the trustee, and the trustee has afterwards been charged with the loss. Beneficiaries who become aware that an investment is a breach of trust must elect what position they will take, they must approbate or reprobate. If they concur in dealing with the property as trust property, they cannot afterwards draw back. They must at the first take the position that they will not have the property, and tell the trustee that he must make good the trust fund, and that until he does so they claim a lien on the property. In *Smethurst* v. *Hastings* (2) the trustee was ordered to pay at once the whole sum invested by him on improper mortgages, the securities being given up to him—he was not merely ordered to make good the loss—the Court repudiated the security.

[COTTON, L.J.:—The fund was immediately divisible, and the mortgages were incapable of speedy realization—that accounts for the form of order.]

Mant v. *Leith* (3) is similar; the trustee was ordered to replace the whole fund, which was repudiating the security and giving the *cestuis que trust* a lien on it. The trustees before selling should have communicated with *Uppleby*, and a sale would then have been made in his presence, or he would have taken to the property.

(1) 1 Jur. (N.S.) 751. (2) 30 Ch. D. 490. (3) 15 Beav. 524, 528.

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But we say that the investment was not a breach of trust. There never was any hard and fast rule that a trustee must never advance more than two-thirds of the value on agricultural land or more than one-half on house property, though there are *dicta* to the effect that those are the limit (see now 51 & 52 Vict. c. 59, s. 4, sub-sect. 1); and a trustee has been held not liable for advancing beyond the limit where he had acted as a prudent man would have acted in dealing with his own property: *In re Godfrey* (1). This, we submit, is the true rule—that a prudent investment is not to be treated as a breach of trust merely because it exceeds those limits.

Decimus Sturges, for the new trustees and other parties to the third party notice:—

No case is made against the new trustees by the Plaintiff. *Uppleby* suggests a case against them of selling improperly, but he has not counter-claimed, so, as representing the new trustees, I have nothing to say. There may be a case under the third party clause which we may have to meet, but that case was not opened in the Court below. There is no evidence upon it, and this Court cannot now deal with it.

S. Hall, in reply:—

I ask for a decree for replacing the trust fund.

[FRY, L.J.:—Can you claim more than your one-sixth of the loss?]

I am content to take that. As regards the main point in the case, the question of option, there is no authority in point, but I submit that no case of option arises where the investment is in securities of a nature authorized by the trust, and that the trustees were right in realizing property which had been handed over to them as being, and which in fact was, part of the trust estate.

COTTON, L.J.:—

This is an appeal by the Plaintiff from a decision of Mr. Justice *Kekewich* dismissing an action brought against *Uppleby*, a retired

(1) 23 Ch. D. 483.

trustee of the will of *Eliza Salmon*, to make him responsible for an improper investment.

There are two questions to be considered. The first is, whether the investment in question was wrongful. It was within the terms of the trust, for it was an investment on mortgage of a freehold estate. In one sense, therefore, it was in accordance with the trusts, and if the trustee took due care as to its sufficiency there would be no breach of trust, and nobody could complain, though it ultimately proved insufficient. The case differs from that of an investment not within the terms of the instrument, which is necessarily a breach of trust, so that if any loss occurs the trustees must be liable for it. The question here is, whether *Uppleby* took proper care in seeing to the sufficiency of the security.

Now as regards the rule which has been so much discussed, as to the amount which may be lent on a given security, the law is thus summed-up in *Learoyd* v. *Whiteley* (1): "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office, than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply. The Courts of Equity in *England* have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have

(1) 12 App. Cas. 727, 733.

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been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept." These rules are there recognized, though they have been impeached by Mr. *Warmington* and Mr. *Wood*. In the present case the value of the property was mainly derived from buildings. I do not think that the valuation of the property has been successfully impeached. We must take the property as having been worth £1750. The trustees lent £1300 upon it. Now, we must have regard not only to the value, but to the nature of the property. It consisted of small houses let at weekly rents, and we know the class of tenants likely to be attracted by cottage property in *Hull*. It was certainly not prudent to lend to this extent upon property the value of which depended on labourers' houses being wanted in that part of *Hull*. The investment, therefore, was a breach of trust as having been made improvidently.

The second point is new, and no authority is to be found upon it. It was contended that the Plaintiff had taken part in the sale of the mortgaged property by the new trustees, and that therefore he could not call on the late trustee for the loss, because, as it was contended, the late trustee was entitled to notice of the intention to sell, so that he might have an opportunity of taking to the mortgage and paying to the trust fund the amount lent on it. If that be the law the late trustee is not liable. But there is a fallacy in this argument; it is founded on treating the mortgage as not being part of the trust estate. That view is wrong. The money was invested according to the terms of the trust, though without due care, and the mortgage was from the first a part of the trust estate. When *Uppleby* retired he transferred the mortgage to the new trustees, to be held on the trusts of the will, and, unless their acceptance of it exonerated him from his liability for taking an insufficient security, I do not see how he was exonerated from the consequences of his neglect of duty. The case is entirely distinct from that of an investment outside the terms of the trust, which the *cestuis que trust* must accept or reject. Here the trustee is only liable for the loss, and that liability is to be enforced when the investment is realized. I think

that the realization was according to the power which *Uppleby* gave to the new trustees by handing over the investment to them, and he is liable for the deficiency. It is like a sale of mortgaged property by the mortgagee under a power without the concurrence of the mortgagor. If the sale is improperly made it may be impeached, but if it is made fairly the mortgagor is bound by it, and is answerable for what remains due on the mortgage after deducting the proceeds of sale. I think that this mortgage was part of the trust property, that no duty therefore arose in the *cestuis que trust* to say whether they would accept or reject it, and that the late trustee is liable for the deficiency.

Thornton v. *Stokill* (1) was referred to in support of the case of the late trustee. In that case the testator, who had been a trustee, had invested part of the trust funds in buying cottage property, which was entirely out of the scope of his power of investment. The *cestuis que trust* wanted to take the cottage property at a certain sum and prove against the estate for the residue of the trust funds. Lord *Hatherley* held that they had a claim to the houses as against general creditors, but that they had no right to set a value on them. They must either sell and prove for the deficiency, or take to the houses. The case has no bearing on the present.

Mr. *Uppleby* then remained liable for the deficiency, though no notice was given to him. The Plaintiff is not open to the objection raised against him that he directed the sale. He did not direct it. The trustees referred to him and he merely said he could not suggest anything better than a sale by auction. He was merely passive. I cannot agree with Mr. Justice *Kekewich*, and there must be a decree against Mr. *Uppleby* for the Plaintiff's share of the deficiency.

FRY, L.J.:—

I have been requested by the Lord Justice *Bowen* to deliver judgment before him. The first question we have to consider is whether the investment was proper? whether it was one which a prudent man would make? I am of opinion that it was improper. A trustee who disregards the rules of the Court as to the amount which may be lent on mortgage of a property, though they are

(1) 1 Jur. (N.S.) 751.

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not hard and fast rules, takes upon himself a great risk. This was cottage property and the trustee invested on mortgage of it more than two-thirds of its value. Not only did he transgress the rule as to two-thirds, but he transgressed it in the case of cottage property in a town, the value of which depends on shifting circumstances; and the fact that at the time of the mortgage some of the houses were unfinished and unlet strongly corroborates the view that the investment was improvident.

The next question is whether the Plaintiff has in any way acted so as to lose his *primâ facie* right to call on Mr. *Uppleby* to make good the loss. Two arguments were brought forward to shew that he had. First, that the Plaintiff purchased after the investment was known to him and that therefore he cannot complain of it. The facts hardly support this argument. The Plaintiff was a mortgagee of *Augustus Bower's* share before the investment complained of was made, and the only information he had of it when he purchased the equity of redemption was that contained in a letter of the 30th of January, 1883, which gave him no reason for questioning the propriety of the investment. There is, therefore, no reason for holding him barred on this ground.

Secondly, it is urged that the Plaintiff was a party to the sale in 1887, and has thereby lost his right. What took place was this, the solicitor to the trustees informed the Plaintiff's solicitor of the intention of the trustees to offer the property for sale, and on the 19th of April wrote to him saying that he could see no course but to offer it for sale unless the Plaintiff could suggest some other course. The Plaintiff's solicitor replied that he could not suggest anything better than a sale by auction. There is nothing in that—the Plaintiff's consent was not required to a sale, and I cannot make out how the Plaintiff can be considered a party to the sale. The substratum of this argument therefore fails.

But then it is urged that, if the Plaintiff has not precluded himself from relief by his own acts, the conduct of the new trustees has released Mr. *Uppleby* from liability. It is urged that an offer of restitution of the property to the trustee who has improperly invested upon it, is a *sine quâ non*, if it be sought to make him liable for the investment. I think that is not so. There is no case to shew that where trust money is improvidently invested on an insufficient security of an authorized description, the trustee

cannot be made liable unless an option is given him of taking to the security. I think that the liability of the trustee in such a case is to make good the loss occasioned to the trust estate by the improper investment. The mode of enforcing this liability depends on the circumstances of the particular case. In some cases justice will be best done by realizing the security and making him pay the deficiency; but in some cases it may be right to make him pay at once the whole sum improperly invested, and let him take the benefit of the security.

In the present case all that the trustees did was this. The retired trustee had lent on a mortgage with a power of sale. On his retirement he transferred the mortgage to the new trustees, and they afterwards sold under that power. How can it be said that they thereby precluded the trust estate from any relief against the retired trustee? They sold under the power which he himself had given them by transferring the security to them.

BOWEN, L.J.:—

I am of the same opinion, and shall add nothing as to the law of the case. I do not differ from anything that has been said by the Lords Justices, but I do not think that the question of law on which Mr. *Uppleby* mainly relies arises on the facts. I cannot see that the Plaintiff directed the sale, or did anything more than stand by, and I see nothing in that to take away any rights which he had.

An order was made declaring the investment a breach of trust, and ordering *Uppleby* to pay to the Plaintiff £80, being his share of the loss, with interest from the death of the tenant for life. Liberty to any beneficiary not bound by the release and indemnity to apply in Chambers for the loss sustained by him. The questions on the third party notice were remitted to Mr. Justice *Kekewich.*

Solicitor for Plaintiff: *H. Hocombe.*

Solicitors for *Uppleby*: *Hicks & Son*, agents for *Brown & Son, Barton-on-Humber.*

Solicitor for the new trustees and the beneficiaries: *Y. H. Bird*, agent for *H. C. Lisle, Nantwich.*

H. C. J.

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July 20, 30.

PRICE v. MANNING.

[1887 P. 2040.]

Practice—Witness—Right to cross-examine—Adverse Litigant.

A party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the Judge. Whether the witness is a litigant or not, it is a matter of discretion in the Judge whether he shews himself so hostile as to justify his cross-examination by the party calling him.

Dictum of *Best*, C.J., in *Clarke* v. *Saffery* (1) disapproved.

IN this action the counsel for the Plaintiff during the hearing before Mr. Justice *Kay* called the Defendant as a witness to prove a point in his case. The Defendant was then cross-examined by his own counsel. In his re-examination, the Plaintiff's counsel put questions to him in the nature of cross-examination, treating him as a hostile witness. Mr. Justice *Kay* refused to allow this to be done.

On the appeal by the Plaintiff,

P. F. Stokes, for the Appellant, contended that the Judge was wrong in disallowing the questions, as the Defendant was of necessity a hostile witness, and in that case the Plaintiff had a right to cross-examine him. He relied on *Clarke* v. *Saffery* (1); *Taylor* on Evidence (2); *Roscoe* on Evidence (3).

Marten, Q.C., and *V. R. Smith*, for the Defendant.

Their Lordships dismissed the appeal, which does not require a report. In the course of his judgment,

COTTON, L.J., said—

The Plaintiff contends that having called the Defendant as a witness he was entitled as of right to cross-examine him, and in support of this contention *Clarke* v. *Saffery* is relied on. But in my opinion that is a matter in the discretion of the Judge. He

(1) Ry. & Mood. 126. (2) 7th Ed. p. 1178.
(3) 15th Ed. p. 156.

sees the witness and can determine from his manner whether he is so hostile that the Plaintiff should be allowed to cross-examine him. In *Clarke* v. *Saffery* (1) Chief Justice *Best* is reported to have said that "if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may, as a matter of right, cross-examine him." But in *Bastin* v. *Carew* (2), reported in the next page, Chief Justice *Abbott* said that in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be conducted. In my opinion whether the Plaintiff should be allowed to cross-examine this witness was a matter in the discretion of the Judge, and the Judge has exercised his discretion, and we ought not to interfere with the exercise of that discretion.

FRY, L.J.:—

I am entirely of the same opinion. It has been urged before us that although the Plaintiff called the Defendant he had the right to cross-examine him. Mr. Justice *Kay* refused to accede to this view, and in my opinion he did right. The Plaintiff had no right to cross-examine the witness he had called, he could only do so with the sanction of the presiding Judge. It is quite true that in *Clarke* v. *Saffery* Chief Justice *Best* appears to have laid down that a plaintiff calling a defendant is entitled as of right to cross-examine him. In that case the Vice-Chancellor had directed an issue to try whether a commission in bankruptcy in which the defendant was petitioning creditor had been concocted between the defendant and the bankrupt, and gave the plaintiff leave to examine on the trial both the defendant and the bankrupt. In the course of the trial the plaintiff's counsel called the defendant, and an objection was taken by the defendant's counsel to the mode of examining the defendant. Chief Justice *Best* said "there is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shews himself decidedly adverse, it is always in the discretion of the Judge to allow a cross-examination." Then follows the passage to which the Lord

(1) Ry. & Mood. 126. (2) Ry. & Mood. 127.

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Justice *Cotton* has referred. I doubt whether the judgment is quite accurately reported as making Chief Justice *Best* lay down the rule contained in the last paragraph of his judgment. If it is accurate I differ from it, as not being in accordance with the practice of the Courts. So far as my experience goes such a right does not exist, but it is in the discretion of the presiding Judge whether the cross-examination should be allowed.

LOPES, L.J.:—

Whether the witness called by one party is a litigant or non-litigant it is a matter of discretion in the presiding Judge whether the witness has shewn himself so hostile as to justify his cross-examination by the party calling him. This rule applies in a case where an opponent is called as a witness. What was said by Chief Justice *Best* in *Clarke* v. *Saffery* (1) is not in accordance with the practice of which I have had thirty-six years' experience. What was said by Chief Justice *Abbott* in *Bastin* v. *Carew* (2) is in accordance with the general practice. I have mentioned the point to the Master of the Rolls and to the Lords Justices *Lindley* and *Bowen*, and their view of the practice is the same as mine.

Solicitors: *A. G. Ditton: Badham & Williams.*

(1) Ry. & Mood. 126. (2) Ry. & Mood. 127.

M. W.

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CHITTY, J.
May 1, 2.
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July 30.

[1888 S. 3537.]

Vendor and Purchaser—Conditions of Sale—Right to rescind—Making and insisting on Requisitions—Unwillingness to comply.

Land was contracted to be sold under a condition that if the purchaser should "make any objection to or requisition on the title" which the vendors should be "unable or unwilling to remove or comply with" the vendors might by notice in writing annul the contract.

Requisitions were sent in, and thereupon the vendors, who were trustees, passed a resolution that as some of the requisitions could not be complied with, and others would cause great trouble and expense, notice should be given to rescind the contract; and, without attempting to answer them, they served a formal notice on the purchaser annulling the contract and stating that they were "unwilling to remove or comply with" the requisitions or any of them:—

Held (affirming the decision of *Chitty*, J.), that the right to rescind arose directly the requisitions were made; that the vendors were not bound to state their reasons for rescinding; that though the word "unwilling" ought to be interpreted "reasonably unwilling," yet on a general statement that the rescission was *bonâ fide*, and in the absence of any evidence of caprice or *mala fides*, the Court ought not to infer that the vendors were acting unreasonably, and that consequently the contract had been duly annulled.

ON the 31st of July, 1888, leasehold houses in *Prince Edward's Road, Victoria Park*, in the county of *Middlesex*, were put up for sale by public auction subject to certain printed conditions of sale; one of which provided that the expenses attending the production of deeds not in the vendor's possession and further evidence and information should be borne by the purchaser. The seventh condition, after providing in the usual way for the time within which requisitions and objections to title were to be sent in, continued: "And in case the purchaser shall within the time aforesaid make any objection to or requisition on the title which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty at any time thereafter, notwithstanding any attempt to remove or comply with such objection or requisition, by notice in writing to be given to the purchaser or his solicitor, to annul the contract and to return

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to the purchaser his deposit money without interest, costs, or other compensation."

The vendors were the trustees of the 163*rd Starr-Bowkett Building Society*, which was in course of dissolution and was insolvent. *Charles Sibun* was the purchaser of one of the houses for the sum of £240, and the contract at the end of the printed conditions of sale was duly signed by him, and a deposit of £24 was paid.

An abstract of title was delivered by the vendors, and the purchaser on the 14th of August delivered his requisitions and objections on title, nineteen in number. The first five merely asked for information as to insurance, ground rent, identity, whether notice to repair, &c., had been received, and for a copy of the rules of the society; by the sixth the vendors were required to abstract in chief an order of the 26th of July, 1886, and to shew that an action had been discontinued. By the seventh the execution of a certain indenture was required to be duly attested; the eighth required registration of this deed in *Middlesex;* the ninth, tenth, and eleventh required further information as to the dissolution of the society; the remaining requisitions inquired as to land-tax, rights of way, easements, and whether *Prince Edward's Road* had been taken over by the parish, and required production of the last receipt for rent and for ground rents.

On the 20th of August these requisitions were submitted to the vendors as trustees of the society, when it was resolved that "as some of the requisitions could not be complied with, and as great trouble and expense would be incurred in complying with others, notice to rescind the contract should be given under the seventh condition of sale."

On the 23rd of August, the vendors' solicitors wrote to the purchaser informing them of their intention to annul the sale, and inclosing a formal notice "that the vendors were unwilling to remove or comply with the objections or requisitions on title, or any of them." They at the same time inclosed a cheque for the £24 deposit, and requested that the abstract might be returned.

In answer to this notice the purchaser's solicitors wrote to the

vendors' solicitors returning the notice and the cheque for the deposit as follows: "It is quite clear from the authorities that the vendors are bound to answer the purchaser's requisitions on title and thus give the latter an opportunity of waiving them, and that the power to rescind cannot be exercised capriciously or unreasonably. Such a power is inserted in contracts simply to protect a vendor from vexatious requisitions, and it must be used *bonâ fide.*" In reply to this the vendors' solicitors wrote: "We consider that our clients in annulling the contract avoided further delay and expense, as they are unable to comply with any of the requisitions, and the course they have taken is a perfectly *bonâ fide* one."

On the 25th of August, the purchaser's solicitors again wrote saying: "Let us have the best answers you can to our requisitions, and we will consider whether those which you are unable to comply with can be waived." As the vendors, however, insisted upon their notice to rescind, the purchaser took out a summons under the *Vendor and Purchaser Act*, 1874, asking for a declaration that the notice delivered on behalf of the vendors was not effectual to annul the contract, and that the vendors were not entitled to annul the same.

An affidavit by two of the vendors was filed stating that the resolution of the 20th of August was passed *bonâ fide* and with the sole object of avoiding further expenses owing to the society being insolvent.

From the evidence filed on behalf of the purchaser it appeared that he had sold the benefit of his contract at an increased price of £60.

The summons came on for hearing before Mr. Justice *Chitty* on the 1st of May, 1889.

Byrne, Q.C., and *G. T. Millar*, for the summons:—

The contract contemplates that requisitions may be made, for it provides in the usual way for a time within which they are to be sent in, and yet the instant the requisitions are made we are served with a notice to rescind. Some reasonable interpretation must be put upon a condition of this kind, it cannot entitle a vendor arbitrarily to put an end to the contract the moment a

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requisition is made, especially as the purchaser is invited by the conditions to send in requisitions. The principles laid down in *In re Dames and Wood* (1) are applicable to the present case. "Unwilling" must mean "reasonably unwilling," the kind of unwillingness stated by *Bramwell*, B., in *Gray* v. *Fowler* (2); the vendors here must have been able to answer the greater number of these requisitions. Requisition six is the only one involving any expense, and yet it only asks for what should have been originally abstracted in chief. Any expense occasioned by requisitions seven and eight would have to be paid for by the purchaser. In this case the vendors do not intimate what requisitions they are unable, what they are unwilling to answer, and do not shew any reasonable grounds for their unwillingness; the *onus* of proving that the unwillingness is reasonable lies on the vendors, not on the purchaser; some reasonable ground of unwillingness must be shewn: *Duddell* v. *Simpson* (3). True the words in this condition are not in case the purchaser shall "insist," as in *Greaves* v. *Wilson* (4), or "persist," as in *Mawson* v. *Fletcher* (5), but the word "make" must have the same meaning, if a reasonable construction is given to the condition.

Romer, Q.C., and *G. Henderson*, for the vendors:—

Assuming that some limitation must be put on the wording of condition seven, as contended for by the purchaser, what does it amount to; simply that the power cannot be exercised for mere caprice or in bad faith. There is no evidence of caprice or *mala fides*, no suggestion of it. The vendors in a case like this are not bound to state their reasons for rescinding, though they must have one: *Re Glenton and Saunders* (6); this case seems to qualify some of the *dicta* in *In re Dames and Wood*, relied on by the purchaser. The burden of proving *mala fides* or caprice is on the purchaser, and he has not done so. *Duddell* v. *Simpson*, shews that we were not bound to give the purchaser any *locus pœnitentiæ;* that would be to introduce a new term into the contract, which the Court will not now do.

(1) 29 Ch. D. 626.
(2) Law Rep. 8 Ex. 249, 265.
(3) Ibid. 2 Ch. 102.
(4) 25 Beav. 290.
(5) Law Rep. 6 Ch. 91.
(6) 53 L. T. (N.S.) 434.

Byrne, in reply:—

The vendors have not complied with their own contract, they never even delivered a perfect abstract. Some reasonable grounds for rescinding must exist, which when challenged the vendors can produce. No reasons are given here, though we have asked for them. If the vendors' contention is correct, then in every contract with a condition similar to this one no purchaser can safely make any requisitions, however reasonable, because the instant requisitions are made the right to rescind arises.

CHITTY, J.:—

The question for decision is whether the contract of purchase of the 31st of July, 1888, has been duly annulled by the vendors in pursuance of a power to annul which is contained in the 7th condition.

The facts are these. The property sold was a leasehold property, and the purchase-money was £240. The property was sold by auction, and the sellers are the trustees of a building society, which appears to have been dissolved. The conditions of sale contain stipulations with regard to the title, and the 7th condition states in the usual way that requisitions or objections to the title, if any, not concluded by the conditions, are to be made in writing within a certain time, and if not so made are to be deemed waived. "And in case the purchaser shall, within the time aforesaid, make any objection to or requisition on the title which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty at any time thereafter, notwithstanding any attempt to remove or comply with such objection or requisition, by notice in writing to be given to the purchaser or his solicitor, to annul the contract, and to return to the purchaser his deposit money without interest, costs, or other compensation."

The abstract was delivered to the purchaser, and it would appear from the requisitions made that it was considered in some respects defective. Requisitions and objections were delivered on the 14th of August, which was within the time. These requisitions are nineteen in number, several of them being of an ordinary and innocent description, but some of them of a material

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character. These requisitions were considered by the trustees, who were the vendors, and they held a meeting on the 20th of August and resolved "That as some of the requisitions could not be complied with, and as great trouble and expense would be incurred in complying with others, notice to rescind the contract with the said *Charles Sibun* should be given under the 7th of the conditions of sale."

In an affidavit which has been filed the vendors say that the resolution was passed *bonâ fide*, and with the sole object of avoiding further expense, owing to the society being insolvent. On the 23rd of August a notice in pursuance of that resolution was sent to the purchaser's solicitors with this letter: "Our clients being unwilling to answer or comply with your requisitions, they have decided to annul the contract, and we herewith send you formal notice and cheque for the return of the deposit, amounting to £24. Please return us the abstract of title." That was answered on the following day by the purchaser's solicitors, who referred to *Dart's* Vendors and Purchasers, and contended that the power to rescind could not be exercised capriciously or unreasonably, and that the vendors were bound to answer the requisitions and give the purchaser an opportunity of waiving them, and they add: "We must, therefore, request you to forthwith send us replies to the requisitions." That letter is answered on the same day by the vendors' solicitors, who state that they are aware of the authorities, "and consider that our clients in annulling the contract avoided further delay and expense, as they are unable to comply with many of the requisitions, and the course they have taken is a perfectly *bonâ fide* one." Then the purchaser's solicitors reply, asking for the best answers that could be given to the requisitions, and stating that they would consider whether those which the vendors were unable to comply with could be waived. The vendors, however, insisted on the notice, and thereupon this summons was taken out asking in substance for a declaration that the contract is still subsisting.

The purchaser in his evidence merely states the facts barely, not stating the resolution which I have mentioned, and there has not been raised even by a suggestion on the face of any affidavit filed any case against the vendors on the ground that the power

has been exercised *malâ fide* or capriciously. But it is contended at the bar on behalf of the purchaser that the Court ought, notwithstanding the affidavit on the part of the vendors to which I have referred, to infer in the circumstances of the case, adversely to that affidavit, that the power has not been exercised in good faith, but that it has been exercised unreasonably and capriciously. Some general observations were made in regard to a condition of this kind. It was said that if the condition were construed literally it would amount to a trap in which a purchaser would be caught. That is but a general observation, and I think it is met by an equally general observation, that in a case of this kind there is no trap. The vendors state plainly in their conditions on what terms they propose to sell, and it is for the purchaser to consider whether he will enter into the contract on the terms proposed or not. These conditions were printed, and there is no case made against the contract in any way. The present rule of the Court is not to make new contracts for men, and not by means of construction indirectly to do that which the Court declines to do directly. There is one general observation which occurs to me in reference to the point raised upon clauses of this kind—that men do deal with one another on a footing of credit and trust, and, further, that where a man puts up his property for sale and inserts a condition of this kind it must be borne in mind that the vendor himself has been at the expense of preparing for the sale and putting the property up for sale by auction and making out an abstract, employing his solicitors to read the abstract, and so forth; and, therefore, where the condition is such as the one I have before me, there is a pecuniary reason why a vendor should not, as it were, fine himself by exercising this power capriciously. These are general observations, and I only make them to meet the general observations addressed to me at the bar.

There remains of course the question of the construction of a condition of this kind. There are two points that appear to me to be authoritatively decided at the present day. Where the condition is if the purchaser shall insist upon the requisition being complied with the vendor may annul the contract, if the purchaser, having made the requisition and received an answer

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which he considers unsatisfactory, says, "I press this requisition," the right on the part of the vendor to rescind arises at once, and there is no further *locus pœnitentiæ* allowed to the purchaser—in other words the proposition is that where once the insistance on the objection is shewn the right of the vendor to rescind arises, and he is not bound by notice or in any other way to intimate to the purchaser that if he goes on insisting the power will be exercised adversely to him. I am dealing with the case where the condition is if the purchaser shall insist on the requisition, and the ground on which the Court has declined to admit the argument that there is a further *locus pœnitentiæ* given to the purchaser, is, as was stated by *Turner*, L.J., in *Duddell* v. *Simpson* (1), and has been pointed out by other Judges since, that that would be adding a new term to the contract. That point being established beyond question at the present day, it appears to me that where the terms of the condition are if the purchaser shall make any such objection or requisition, the right to rescind by parity of reasoning arises immediately on the requisition or objection being made. To hold the contrary, following the course of reasoning I have referred to, would be to insert a new term into the contract.

Another point is clearly established, that is that on a condition of this kind the vendor is not bound to state his reasons. The Court of Appeal had that point before them in the case of *Re Glenton and Saunders* (2), and every member of the Court gave judgment to the same effect—that the vendor was not bound to give his reasons.

Now I come to the true meaning of the term "unwilling" in a clause of this class. It might have been held that the term is to be taken according to its grammatical import, and that it is for the purchaser to consider, on entering into the contract, whether he would or would not expose himself to the risk of having his contract terminated if the vendor was unwilling to comply with the requisitions made, and the term "unwilling" by itself, of course, refers to the state of mind of the vendor, and *primâ facie* the vendor would only have, according to the literal grammatical meaning, to say "I am unwilling," in other words

(1) Law Rep. 2 Ch. 1. (2) 53 L. T. (N.S.) 434.

"I will not, and no other person is to be the judge whether I am exercising my will reasonably or unreasonably."

Now in the case of *In re Dames and Wood* (1) the Court of Appeal had this kind of condition—a condition substantially in the same words as the condition before me—under consideration, and there are expressions used which, when the judgment is examined, are *dicta*, but which tend to shew that in the opinion of the Court of Appeal "the vendor" (I am reading now the words of Lord Justice *Cotton*) "cannot avail himself of such a condition arbitrarily, or unless he shews some reasonable ground for his unwillingness to answer the requisitions." The opinion thus expressed was not necessary to the decision, because the Court went into the case on the facts, and came to the conclusion that if that were the true rule, at any rate in the case then before them, the vendor had reasonable ground for exercising the power to rescind. Lord Justice *Fry* in that case, in his short judgment, pointed out the exact scope of the decision of the Court of Appeal, and the questions which the judgment left open included the point upon which I have already expressed my opinion, namely, whether the right to rescind arose simply because the purchaser had taken the objection, and also the question whether the burthen of proving that the power was exercised on reasonable grounds rests on the vendor who exercises it, or on the person who impeaches the exercise of the power. There is no decision therefore in *In re Dames and Wood* as to what the term "unwilling" means, but there are *dicta*, and expressions that fell from the Court, which tend to shew that, although the Court did not so decide, the term "unwilling" could not be taken in its literal and grammatical sense. The point came again before the Court of Appeal on a somewhat similar condition in the case I have already referred to of *Re Glenton and Saunders* (2), and Lord Justice *Cotton*, after stating that if the vendors had reason for rescinding, it was not necessary they should state the reasons to the purchaser, goes on to say: "The result of the authorities is that a vendor cannot capriciously avail himself of such a condition as this; and in the recent case of *In re Dames and Wood* we doubted whether even that was right,"

(1) 29 Ch. D. 626. (2) 53 L. T. (N.S.) 434, 436.

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that is to say, they doubted whether there was the limitation of capriciousness to be put on the meaning of the term "unwilling," but although he must have a reason for exercising his power, the reason need not be stated. Then the Lord Justice goes on thus: "We have to decide, then, whether the exercise of the right was in this case capricious. A purchaser is, no doubt, under a difficulty when he does not know whether a vendor has a reason for rescinding, but that difficulty arises from his entering into a contract containing such a condition." Lord Justice *Lindley* and Lord Justice *Bowen* also refer to capriciousness, and Lord Justice *Lindley* says that mere caprice will not justify a vendor in rescinding and Lord Justice *Bowen* says that mere caprice is not sufficient; but both those learned Judges are, as I have already stated, of opinion that the reason upon which the vendor acts need not be communicated. I take it, therefore, that there is some limitation to be put upon the meaning of the term "unwilling," or something has to be added to it, and I take it now to be established, sufficiently to bind me, by that case that although the contract is in terms that the vendor may rescind if unwilling to comply with the requisitions, still if it be shewn that he is acting capriciously the power is not well exercised, and there is an expression to the effect that if it is not reasonable the power is not validly exercised. But then the Court of Appeal have determined that the vendor is not bound to submit his reasons to the purchaser, and they decide that if he has a reason, although he does not state it, that is sufficient. In this case the vendor did state on his notice to rescind that he rescinded on the ground of expense. That is in the affidavit. The resolution goes beyond that, and states that the vendors were unable to comply, and the affidavit, as I have pointed out, in terms says that the resolution was come to *bonâ fide*, by which I am bound, as there has been no cross-examination of the vendors, to take it that the statement that they made in their resolution was a true statement. There has been no cross-examination of the vendors, and there is no evidence, as I have pointed out in the beginning of the judgment, imputing bad faith, or vexation, or caprice, to the vendors. Ought I therefore in these circumstances (now I am dealing with the critical point of the case) to infer as against

that affidavit, that the power has been exercised unreasonably or capriciously. I mentioned that the Lord Justice *Fry* considered it an open question upon whom the burthen of proof would rest. I do not know that it is necessary for me in this case to express any decided opinion on that point. Generally speaking, when there is a power, and it is said that the power is exercised *malâ fide*, corruptly, or the like, or from some improper motive, the burthen rests on the persons who make the imputation; but in the case before me, assuming that the burthen of proof rests on the vendors, have not the vendors discharged it? There being no evidence on the other side, I think I ought not to draw, adversely to the oath of the Defendants, the inference that I have mentioned; and it must be borne in mind, to come back to a point which I mentioned some time ago, that these gentlemen are trustees selling, and that they or their trust fund will have to bear all the expense of this abortive sale; and seeing these numerous requisitions, for they are numerous (there are nineteen of them), and having regard to the small value of the property, £240, can I say judicially that they have acted by caprice, or unreasonably, if that be the right term, because they say, "We at once instead of prolonging this matter (and delay is referred to in one of the letters I have read) exercise this power to make an end of it, we shall suffer by losing the expense we have been put to, and you will suffer by losing a less sum of money in the expense you have been put to, and we are not bound, as the Court of Appeal have said, to state our reasons, and if you mean to impugn our good faith you should have brought forward some better evidence than you have done, something in the way of direct testimony, or something in the way of challenge, and you might, if you thought you could establish a case against us, have examined us with regard to the details of those matters which are only covered by the general expression of good faith in our affidavit; and you have not chosen to do it." The result is therefore that the Defendants say that they ought to have credit for the statement made in the affidavit. I think therefore that in the circumstances of this case the power has been well exercised, and the contract has been annulled by the notice which was given.

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That dismisses the summons, necessarily with costs.

G. M.

From this judgment the purchaser appealed. The appeal was heard on the 30th of July, 1889.

Byrne, Q.C., and *R. J. Parker*, for the Appellant, cited *In re Dames and Wood* (1); *Duddell* v. *Simpson* (2); *Re Glenton and Saunders* (3); *Greaves* v. *Wilson* (4).

Romer, Q.C., and *G. Henderson*, for the vendors, were not called on.

COTTON, L.J.:—

This is an appeal against a decision of Mr. Justice *Chitty* affirming the right of the vendors of certain property to rescind the contract in consequence of requisitions sent in by the purchaser. The conditions of sale contained the following stipulation [His Lordship read the 7th condition]: Certain requisitions were sent in by the purchaser in due course, and in a short time afterwards the vendors sent a notice annulling the contract; and the question is whether this act of the vendors was a good exercise of their power to rescind. It was said that the time to exercise it had not arrived, and that the "making" of a requisition referred to in the conditions was equivalent to "insisting on" one, and that no requisition had been insisted on. I am not inclined to twist the words used so as to make them fit in with what is considered proper. The word "make" means something different from "insist on," and we must take the words as they are written in the condition. Then it was contended that the purchaser was entitled to a *locus pœnitentiæ;* that he ought to have time in which to consider whether he would withdraw his requisitions before the vendors exercised their power to rescind. That argument is disposed of by the case of *Duddell* v. *Simpson* (5). There Lord Justice *Turner* said that to give the purchaser the right to notice in order that he might have time to

(1) 29 Ch. D. 626.
(2) Law Rep. 2 Ch. 102.
(3) 53 L. T. (N.S.) 434.
(4) 25 Beav. 290.
(5) Law Rep. 2 Ch. 106.

waive the objection would be to add to the contract what was not to be found in the words. The only question, then, is whether the vendors had acted arbitrarily or capriciously in rescinding the contract. An objection has been taken to the formal notice given to the purchaser on the ground that it did not state the particular requisitions which the vendors declined to answer. But it has been decided that the vendor is not bound to state to the purchaser the reason why he is unwilling or unable to comply with the requisitions, and though there may be some objection to the form of this notice the question whether the vendors have acted arbitrarily or capriciously must be tried not by the consideration whether the notice was in a correct form, but whether upon the facts their conduct has been arbitrary or capricious. The purchaser can never tell when he makes his requisitions whether the vendor will answer them by saying he will rescind; he has the power to do so under the contract, but if he exercises his power capriciously it is treated as if it was not within the contract. Was the exercise of the power capricious in this case? We have the affidavit of two of the trustees that they had held a meeting at which they had considered the matter, and that they were induced to rescind the contract by the great expense and the consideration that the society was insolvent; and they stated that the resolution was come to *bonâ fide*. There was no cross-examination on the affidavit, and we must take it to be true. There was no evidence on the other side to shew that the action of the trustees was capricious. It was contended that the vendors by their conditions of sale had invited and induced the purchaser to send in requisitions. They did not induce him to make requisitions; they only limited a time within which any requisitions or objections were to be sent in. Then it was said that the expense of the requisitions for further evidence and information would not really fall on the vendors, but on the purchaser; but the vendors knew that considerable expense would be incurred and they could not be sure that when the costs were taxed the vendors could recover all the expenses from the purchaser. There is nothing in the evidence to satisfy us that the rescission in this case was made arbitrarily or capriciously; on the contrary, on the facts before us I should come to the

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conclusion that it was made upon reasonable grounds. The appeal must be dismissed.

FRY, L.J.:—

I am of the same opinion. No doubt the condition on which the question turns is a very stringent condition, one against which I can well understand that a struggle would be made: and a struggle has been made in this case to construe the condition in a different way from what the words import. The counsel for the Appellant sought to import three terms: First, that the purchaser was entitled to be told which requisition the vendor was unable or unwilling to answer; secondly, that he must allege a reasonable ground for withdrawing from the contract, if he does withdraw; and in the third place that the purchaser is entitled to a reasonable time in which to withdraw his requisitions, and that it is not till a reasonable time has expired that this power to annul the contract is to be exercised by the vendor. I am not saying that these three terms are not reasonable terms to be inserted in such a contract, but not one of them is inserted in this condition. Therefore I must reject all these three glosses. Then it was pressed upon us that the word "make" meant to "insist on." That is a very remarkable construction of the word. Every barrister, every solicitor, everybody indeed conversant with the sale of real property knows perfectly well what it is to "make" a requisition, and we cannot alter the words of the contract by adopting the gloss which the counsel for the Appellant have put upon it. The Courts, it is true, have introduced a term into such contracts, namely, that the power to rescind must be exercised reasonably and not arbitrarily or capriciously. Whether the introduction of such a term is construing a contract, or making a fresh one, I do not say; but there is such a current of *dicta* and authorities on that point that it must be considered settled. Then we come to what is really the only question in the case, was the rescission made without reason? The vendors say that the company was insolvent, and that it would have caused great expense to comply with the requisitions. This is met by saying that the expense of complying with most of the requisitions would have fallen on the purchaser.

But when we look at the requisitions it is shewn that the whole expense could not have fallen on the purchaser. The vendors say they had considered the requisitions, and believed it would have caused them great expense to comply with them, and they have not been cross-examined. In my opinion on whichever side the burden of proof lay, it is sufficiently clear that the vendors had acted reasonably and not capriciously. I therefore agree that the appeal must be dismissed.

LOPES, L.J.:—

This question turns on the meaning of this condition having regard to its terms and intention. In my opinion it gave the vendors a right to rescind, provided it was not done capriciously, and provided the unwillingness or inability was reasonable; and further, it has been held that the grounds for rescinding need not be communicated to the purchaser. When does this right arise? Immediately on the requisition being made. It was argued that the word "made" must be read as meaning "insisted on." That was certainly a bold construction, and I cannot accede to it. The meaning of the word is perfectly understood by every conveyancer. That being so, I am not prepared to say that the notice in this case was given capriciously or upon unreasonable grounds. There is no evidence that it was so given. On the other hand the vendors have filed an affidavit stating that it was given *bonâ fide* and to avoid expense, and there has been no cross-examination on this affidavit. I think therefore we ought to assume it to be true. The decision of the Judge was right and the appeal fails.

Solicitors: *Birt & Follett; Burgoyne-Watts & Co.*

M. W.

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PROCTOR *v.* BAYLEY.

[1889 P. 5591.]

Injunction—Past Infringement of Patent—Intention to infringe.

In August, 1882, *A.* set up in *B.'s* factory four machines of his own make to be taken and paid for if they worked to *B.'s* satisfaction. They were used till April, 1883, when *B.*, being dissatisfied with them, took them down, laid them in his yard, called on *A.* to take them away, and never used them again. *A.* did not take them away till January, 1885. In March, 1887, *P.*, who had obtained a judgment against *A.* that *A.'s* machines were an infringement of a patent belonging to him, claimed royalties from *B.* *B.* replied that *P.* could satisfy himself by calling at *B.'s* mill that *B.* was using neither *P.'s* nor *A.'s* machines, and had no intention of so doing. Further correspondence took place, and *B.* denied all liability, alleging that he had not bought the machines from *A.*, who had set them up on trial, and as they did not work well had to take them down, and that *B.* had not used and was not using any machine which infringed *P.'s* patent. In January, 1888, *P.* brought his action in the Chancery of the County Palatine against *B.* for an injunction and an account or damages. *B.* put in a defence denying infringement, and stating that if he ever had used machines infringing the patent such user had been discontinued long before the action, as the Plaintiff knew, and that *B.* never threatened or intended and did not threaten or intend to use any apparatus infringing the patent. The Vice-Chancellor granted an injunction and an inquiry as to damages:—

Held, on appeal, that though *B.* had infringed the patent, it was not to be inferred from the circumstances that he had any intention to infringe it again, and that *P.* if he had made such inquiry as he ought would have discovered this; that there was, therefore, no case for an injunction, and that (the Court of the County Palatine having only the old Chancery jurisdiction) damages could not in that case be given. The judgment of the Vice-Chancellor was therefore discharged, but as *B.* had not given full information, which would probably have prevented litigation, the action was dismissed without costs, the Defendant receiving only his costs of the appeal.

Millington v. *Fox* (1) distinguished.

THIS was an action for infringement of the patent, dated in June, 1875, which formed the subject of the action of *Proctor* v. *Bennis* (2). *Bennis* was a manufacturer of self-acting stokers, which in that action were decided to be an infringement of the Plaintiff's patent.

(1) 3 My. & Cr. 338. (2) 36 Ch. D. 740.

In August, 1882, *Bennis*, who had for some time been soliciting orders from the Defendants for his stokers, set up four of them in four of the Defendants' furnaces, giving a written guarantee that they should work to the Defendants' satisfaction before payment. The Defendants used the stokers for about six or seven months, but were not satisfied with them, and alleged that the consumption of fuel was greater than when the furnaces were fed by hand, and that they often got out of order.

On the 5th of April, 1883, the Defendants wrote to *Bennis* to remove the stokers. *Bennis* asked for further time to set the machines in order, but the Defendants early in April, 1883, took them down, placed them in their yard, and wrote to *Bennis* to remove them. After some further correspondence *Bennis* ultimately removed them in January, 1885. From the time when these stokers were taken down in April, 1883, the Defendants never used automatic stokers of any description.

On the 28th of February, 1887, the Vice-Chancellor of the County Palatine gave a judgment in *Proctor* v. *Bennis*, deciding that the Plaintiff's patent was valid, and that *Bennis's* machines were an infringement of it.

On the 2nd of March, 1887, the Plaintiff's solicitor wrote to the Defendants to the effect that he had learnt from a circular of *Bennis's* that the Defendants had ordered stokers from *Bennis*, that if the Defendants had used the machines it was an infringement, but that the Plaintiff would be satisfied with a moderate royalty, and that if the Defendants declined to pay it the Plaintiff would have no alternative but to commence proceedings as soon as he had acquired the necessary proof of user.

The Defendants on the 9th of March replied: "Your circular to hand. You can satisfy yourselves at any time by calling at the above address" (the Defendants' mills) "that we are neither using *Proctor's* or *Bennis's* stokers, and have no intention of so doing."

On the 4th of August, 1887, the judgment of Vice-Chancellor *Bristowe* in *Proctor* v. *Bennis* was affirmed by the Court of Appeal with some variations in favour of the Plaintiff.

On the 11th of August, 1887, the Plaintiff wrote to the Defendants informing them of the result of the appeal, and claiming

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£5 per flue as royalty. On the 12th of August the Defendants replied: "In reply to your circular, we beg to say that we have no 'stokers.' Mr. *Bennis* put four on our boilers on trial, but after a short time we had to take them off as they were not satisfactory. We wrote your solicitors a short time ago to the same effect." On the 13th of August the Plaintiff answered that the user was the ground of his claim. On the 18th of August the Defendants wrote to the Plaintiff: "We think you misunderstood our letter of the 12th inst. We neither ordered nor purchased the stokers from *Bennis*, he put them in on his own responsibility, and not working right he had to take them out and make our boilers good. Instead of being a source of profit to us it was a serious loss, and we had some thoughts at the time of claiming compensation from him."

On the 8th of September, 1887, the Defendants' solicitors, in answer to a letter from the Plaintiff's solicitor, wrote to him as follows: "After the explanations which our clients gave yours, we really cannot see why they should be troubled with any further correspondence in the matter. However, if your client has made up his mind to take legal proceedings against ours he is, of course, at liberty to do so, and we will accept service of any process you may be instructed to issue." The Plaintiff's solicitor replied that if the Defendants had used infringing machines they must pay royalty. On the 20th of September the Defendants' solicitors answered: "We can only repeat what has been told to your client, namely, that our clients have not used and are not using any machines infringing your client's patent." On the 3rd of January, 1888, the Plaintiff's solicitor wrote again requesting payment of royalty. The Defendant's solicitor replied: "Our clients, as you are aware from our previous correspondence, disclaim any liability in the matter. We will, therefore, accept service of any proceedings you may be instructed to take against them."

On the 17th of January, 1888, the Plaintiff commenced this action in the Court of the County Palatine, and by his statement of claim he referred to the letters patent, and alleged: (2) "The Defendants have infringed the said letters patent by the purchase and use of apparatus constructed or made in accord-

ance with or only colourably differing from the specification of the Plaintiff." (3) "By reason of such infringement as aforesaid the Plaintiff has suffered damage and loss of profits." The Plaintiff claimed: 1. An injunction to restrain the Defendants from infringing the Plaintiff's patent. 2. An account of profits received by reason of infringement. 3. Damages in lieu of account. 4. An order for delivery up of any apparatus made in infringement of the Plaintiff's patent. 4. Costs of the action.

The Defendants by their defence admitted the validity of the Plaintiff's patent, but denied that they had purchased or used apparatus which was an infringement of the patent; or, in the alternative, that if they had used any such apparatus it was in ignorance of the Plaintiff's patent, and was for experiment only, and was unsuccessful, and they submitted that such user was not an infringement. The Defendants further alleged that if they ever used any apparatus made in accordance with or only colourably differing from the Plaintiff's specification, such user had been discontinued long prior to this action, as the Plaintiff knew, and that the Defendants never threatened or intended, and did not threaten or intend, to use any apparatus infringing the Plaintiff's patent.

The action was tried by Vice-Chancellor *Bristowe* on the 15th and 22nd of November, 1888, and a judgment was given granting an injunction to restrain the Defendants from infringing the patent, directing an inquiry as to damages, and ordering the Defendants to pay the costs of the action (1).

The Defendants appealed.

(1) 1888. Nov. 22. Vice-Chancellor *Bristowe* held that there clearly had been a user of *Bennis's* stokers within the meaning of the *Patent Act*, that the user was not merely an experimental user, and that if the Defendants were ignorant of the Plaintiff's patent that was no defence, the result being that the Defendants were liable for an infringement. His Honour, after disposing of these points, proceeded as follows:—

Then comes the allegation that if the Defendants ever used any apparatus constructed or made in accordance with or only colourably differing from the specification of the Plaintiff, such user had been discontinued long prior to this action, as the Plaintiff knew, and that the Defendants never threatened and intended and do not threaten or intend to use any apparatus constructed or made in accordance with or only colourably differing from the specification of the Plaintiff, and that under the circumstances the

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Romer, Q.C., *Rotch*, and *Staffurth*, for the Appellants:—

Assuming that the Defendants infringed the Plaintiff's patent, there had been no infringement since 1885 at the very latest,

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Plaintiff has no right to relief in the action. That raised no doubt a very important question. viz., that where a Defendant has, as in this case, five years ago infringed the patent rights of a Plaintiff, and says, "I have discontinued that user for five years and I do not threaten or intend to continue it," has the Plaintiff any right in this Court, which can only give relief to the Plaintiff if he makes out a case for an injunction. Has, then, the Plaintiff a right to an injunction in such a case as the present? That raises a double point. First, the act is discontinued; secondly, there is no threat to continue it. I think the cases cited and much relied upon both by Mr. *Rotch* and Mr. *Staffurth* are broadly distinguishable from the present case. It was put by Mr. *Maberly* in his opening that such cases as *Adair* v. *Young* (12 Ch. D. 13) and *Nunn* v. *D'Albuquerque* (34 Beav. 595) shew that where a person is in possession of a thing made according to the patented invention you must not assume that he is in possession of it for no purpose at all. Thus in *Adair* v. *Young* it was held that you must not suppose the pumps to have been put on the ship for mere amusement, but you must suppose that they were put there with the intention of being used, therefore there was a right to an injunction to restrain the user. In the same way, where, as in *Upmann* v. *Forester* (24 Ch. D. 231) and *Cooper* v. *Whittingham* (15 Ch. D. 501) and cases of that class, you find things in the possession of the defendant which are clearly within the patent or within the copyright, as the case may be, there it is the duty of the Court to grant an injunction to restrain the use of those things and to restrain infringement by means of such user. But in this case the things being no longer in the possession of the Defendants, and having been removed ever since the year 1885, and having been disused ever since 1883, has the Plaintiff any right to come now for an injunction when there is no threat to continue the use of the things that were wrongly used in the first instance? It appears to me, after great consideration of the point, which is perhaps not very clear upon the authorities, that the Plaintiff has a right to come for that injunction, and that he has a right to say, "You, the Defendants, have clearly on your own admission (for it must be taken now to be practically admitted) used that which was an infringement of my patent, and you have used it in such a way that I have established you to be infringers of my patent right, and you having done so once, although there is now no automatic stoker upon your premises, is not your allegation that you have never used it, and your allegation that you never have infringed, such an assertion of right on your part as entitles me to say I must have that user restrained? you have used the patented article, you have infringed my right, and you say you have neither used it, nor infringed my right, and I say that I am entitled to have my legal title made clear." Looking at the decisions in *Millington* v. *Fox* (3 My. & Cr. 338) and *Geary* v. *Norton* (1 De G. & Sm. 9), and seeing that the right of the Plaintiff is challenged

and there was no threat or intention to infringe again. The statement of claim does not allege such threat or intention. The case stands on the same footing as if it had been in the Court of Chancery before the Judicature Acts; damages could be given only in lieu of or in addition to an injunction, so the Plaintiff could not have any relief unless he could shew a case for an injunction. Thus in *Ferguson* v. *Wilson* (1) it was decided that where there was no title to equitable relief the claim for damages failed, though damage had been sustained. In *Baily* v. *Taylor* (2) it was decided that a plaintiff complaining of piracy has no right to an account in equity unless he establishes his title to an injunction. Now here there is no right to an injunction, for it will not be granted to restrain a party from doing what he does not threaten or intend to do. In *Stannard* v. *Vestry of St. Giles, Camberwell* (3), there had been a threat to commit what was contended to be a trespass, but the intention had been abandoned and another course adopted, and it was held that an injunction could not be granted, because there was no threat and no sufficient evidence of intention to commit a trespass. The Vice-Chancellor relied upon two cases. One was *Millington* v. *Fox* (4). In that case the defendants had used the plaintiffs' trade-mark on steel in ignorance that it belonged to the plaintiffs. The defendants on being informed that the plaintiffs claimed the mark wrote to them saying that they the defendants had never used the marks after they were informed

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not only by the letters but by the pleadings in the action—challenged to the extent of saying that there has been no user, that there has been no infringement—I think that the Plaintiff, having established that there has been user, and that there has been infringement, is entitled to an injunction to restrain future user, although the Defendants do not threaten and do not intend future user, and that having once found the Defendants to have been infringers he is not bound to rely upon their assertion or their undertaking, but is entitled to an injunction which will restrain the Defendants from the user of the particular article by their user of which his patent has been infringed. I think, therefore, that the Plaintiff is entitled to that relief which he claims, and that there must be an injunction to restrain the Defendants from directly or indirectly infringing the letters patent, and an account of profits, if that be pressed for, or damages.

(1) Law Rep. 2 Ch. 77.
(2) 1 Russ. & My. 73.
(3) 20 Ch. D. 190.
(4) 3 My. & Cr. 338.

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that they were private property, that they did not intend to use them again, and they offered to compensate the plaintiffs for any injury they had sustained. By mischance this letter was not delivered till two days after the plaintiffs had filed their bill. On the same day the plaintiffs obtained an interlocutory injunction which the defendants never applied to dissolve. A few days before the bill was filed, one of the defendants, in an interview with the plaintiffs' solicitors, would not make any admission that his firm had used the plaintiffs' marks, and said that the plaintiffs might file a bill if they pleased. The letter then not having been received, and the defendants having defied the plaintiffs, the filing of the bill was justified, there being good reason for inferring an intention to continue the infringement. The other was *Geary* v. *Norton* (1). In that case there was infringement with notice, and all that was decided was that the plaintiff was not bound to rely on the assurance of the defendants that they would not infringe again. These cases do not support the Plaintiff's contention. *Caldwell* v. *Vanvlissengen* (2) shews that the Court will not act on a mere suspicion of future infringement.

Moulton, Q.C., and *Maberly*, for the Plaintiff:—

It is established that the Defendants infringed the Plaintiff's right, and both before the action and in the action they denied that the plaintiff had any claim against them, insisting that there had been no user, and that the machine used was not within the scope of the patent. It is now not disputed that there was a user which infringed the patent. Under such circumstances there is no case shewing that an injunction will be refused, because it cannot be shewn that an infringement is going on, or that the Defendants are threatening or intending to infringe. If the Defendants insist that the Plaintiff has no claim against them, that is an assertion that the Defendants have a right to do what they did, and the Plaintiff is entitled to an injunction to establish his right. It is urged that the statement of claim does not allege any intention to continue the infringement, but it is in the form prescribed by the *Judicature Act*.

(1) 1 De G. & Sm. 9. (2) 9 Hare 415, 430.

[COTTON, L.J.:—It is not demurrable. If the Defendants have infringed it is to be inferred that they will go on infringing unless there is something to shew the contrary.]

The insisting on having a right amounts to the same thing as threatening and intending.

[COTTON, L.J.:—That generally may be so, but here the Judge who saw and heard the witnesses appears to have come to the conclusion that there was not any threat or intention to go on.]

The Defendants are in the same position as the defendants in *Millington* v. *Fox* (1). This case, and *Geary* v. *Norton* (2), shew that where a person has been doing wrong, his promising to do so no more will not save him from an injunction, and *Losh* v. *Hague* (3) supports the same view. The Defendants never in any way admitted that they had done wrong, but put the Plaintiff at arm's length. It was necessary then for the Plaintiff to apply for an injunction to establish his legal right, which the Defendants have never admitted.

[COTTON, L.J.:—If the Appellants ask for costs we will hear a reply on that point.]

Romer, in reply:—

The action was brought improperly. Instead of a common law action for damages or an action in the County Court the Plaintiff brings an expensive action for an injunction, and, being wrong, he ought to pay the costs.

[COTTON, L.J.:—My impression from the first was that the action ought never to have been brought, but I think also that the Defendants did not meet the Plaintiff in the spirit of people who desired to avoid litigation.]

At all events we are entitled to the costs of the appeal, as the Court below has made an erroneous order, which must be discharged.

COTTON, L.J.:—

This is an appeal by the Defendants from a judgment of the Vice-Chancellor of the Duchy of *Lancaster* granting an injunc-

(1) 3 My. & Cr. 338. (2) 1 De G. & Sm. 9.
(3) 1 Webs. Pat. Cas. 200.

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tion and an inquiry as to damages in an action by a patentee for infringement of his patent. That the patent is valid, and that the Defendants have infringed it, is not in dispute, the question is whether there is any ground for an injunction. It does not follow that because a man has done a wrongful act an injunction will be granted against him, though he is liable to damages for the wrong. The Court of Chancery said, "Where a man threatens and intends to do a wrongful act, we will, before it is done, grant an injunction to prevent his doing it, and we will grant it where the act has been done and is likely to be repeated"—the jurisdiction is simply preventive. Now that all the superior Courts exercise the same jurisdiction the distinction between the jurisdiction of the Court of Chancery and that of the Courts of Common Law is often lost sight of. If this action had been brought in the Chancery Division of the High Court damages could have been given, whether the case was one for an injunction or not, but, as the Court of the County Palatine has only the old equitable jurisdiction, damages cannot be given unless the case is one where an injunction could be granted.

Where a patent is infringed the patentee has a *primâ facie* case for an injunction, for it is to be presumed that an infringer intends to go on infringing, and that the patentee has a right to an injunction to prevent his doing so. Again if there has not been any infringement, but an intention to infringe is shewn, an injunction will be granted. In the present case the Defendants have infringed the patent, but we must look at all the circumstances to see whether there is any ground for inferring that they intend to continue to infringe it. In the first place the Defendants are not manufacturers of stokers, they have only used them. The action is grounded on this, that they have used stokers which were an infringement of the Plaintiff's patent. Now the circumstances are that the Defendants used four of these stokers for a short period, and the use of them was finally discontinued in 1883 on the ground that the Defendants found the machines to be useless. Under these circumstances is there any probability that the Defendants will again infringe the patent? I should say certainly not. But there is more than that. The circular sent on the 2nd of March, 1887, by the

Plaintiff's solicitor to the Defendants mentions their having ordered stokers from *Bennis*, and proceeds on the assumption that the Defendants were continuing to infringe the Plaintiff's patent. The Defendants replied, "Your circular to hand. You can satisfy yourselves at any time by calling at the above address that we are neither using *Proctor's* or *Bennis's* stokers, and have no intention of so doing." I cannot commend this answer, for it withholds information the giving of which would probably have prevented this action. Still I think that on receiving this answer the Plaintiff ought to have made further inquiries, and if he had done so he would have discovered that it was four years since the Defendants had committed any infringement. The correspondence goes on, and in August the Defendants wrote to the Plaintiff: "In reply to your circular we beg to say that we have no stokers. Mr. *Bennis* put four on our boilers on trial, but after a short time we had to take them off as they were not satisfactory. We wrote your solicitors a short time ago to the same effect." This again is, in my opinion, not a letter which ought to have been written, and if the Defendants had shewn more desire to avoid litigation I think that it probably might have been avoided. I need not refer any further to the letters. This action was brought, and the Defendants put in a defence which was not quite right, for they disputed the fact of infringement. But they do not stand in the same position as if they had been manufacturers of stokers. Had they been so, their letters and the defence they put in would probably have led to the inference that they intended to continue to infringe the Plaintiff's patent, but, under the circumstances, I think it would be wrong to draw that inference. The Vice-Chancellor appears to have come to the conclusion that there was no intention to continue the infringement. Though the course taken by the Defendants in their letters and in their statement of defence is not the course which they ought to have taken, it does not in my mind lead to the inference that they had any such intention, or to the conclusion that the interference of the Court by injunction is wanted for the protection of the Plaintiff. Nothing that I say must be taken to encourage parties to suppose that they may do a wrongful act and protect themselves by saying that they do not

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intend to do it again. If the Plaintiff here had sued at common law, the Defendants would have been in the wrong, and would have had no defence, but he had no ground for coming into equity when the protection afforded by an injunction was not wanted.

The Vice-Chancellor thought that the reported cases obliged him to grant to the Plaintiff the relief he sought. *Millington* v. *Fox* (1), on which he mainly relied, was certainly a strong case, for, in all probability, the defendants had used the plaintiff's trade-mark in ignorance that it belonged to the plaintiff, and did not intend to use it again. But the plaintiff's attorney deposed that he had made an application to the defendant *S. Fox* to inform him whether the defendants' firm had affixed the plaintiff's mark to their goods, that *S. Fox* would make no admission that his firm had used the mark, and said he would not interfere, but the plaintiffs, if they liked, might file a bill. From this the legitimate inference was that the defendants intended to continue what they were doing. The Lord Chancellor says that if the letter of the 2nd of August had been received before the bill was filed it would have been wrong to file it, because that letter clearly shewed that the defendants did not intend to go on using the plaintiff's trade-mark, but he was of opinion that as the circumstances as they stood at the filing of the bill justified the plaintiff in believing that the defendants intended to go on with the user of his trade-mark, the filing of the bill was proper, and an injunction ought to be granted. In *Geary* v. *Norton* (2) the defendants had sent an order for 100 shawls, which was an infringement of the plaintiff's rights. The defendants said they would not do it again. But the act had been done just before the bill was filed, and the reasonable presumption was that the defendants would do it again. The Court therefore thought that the plaintiff was not safe without an injunction. In the present case, notwithstanding the course taken by the Defendants, the Plaintiff, in my opinion, was not upon the facts justified in believing that they intended to continue the infringement, and the injunction, therefore, is wrong.

As regards damages the Court of the County Palatine has no

(1) 3 My. & Cr. 338. (2) 1 De G. & Sm. 9.

jurisdiction to give them except under *Lord Cairns' Act*, and where there is no case for an injunction, damages under that Act ought not to be given. There being in the present case no title to equitable relief, damages cannot be given. The judgment of the Vice-Chancellor must therefore be reversed, and the action dismissed. The Defendants, however, have so conducted themselves that they ought not in my opinion to have any costs in the Court below, but they will have the costs of the appeal.

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FRY, L.J.:—

The Vice-Chancellor has in this case granted an injunction and directed an inquiry as to damages. Under *Lord Cairns' Act*, there is no jurisdiction to give damages except in substitution for or in addition to an injunction. Unless, therefore, the Plaintiff can establish his right to an injunction, his case wholly fails. The Defendants are not manufacturers or vendors of stokers, nothing is alleged against them but user of machines which were an infringement of the Plaintiff's patent, and this user was a single and isolated act which took place nearly five years before the action was commenced. From that time to the present the Defendants have never used the machines, the use of which they abandoned because they found them unserviceable, so there is no ground for inferring that they intend to infringe the patent again. Now an injunction is granted for prevention, and where there is no ground for apprehending the repetition of a wrongful act there is no ground for an injunction. It was pressed on us that the Defendants insisted on their having a right to do what they had done, but, looking at all the circumstances of the case, this foolish attempt to justify a past act does not raise any presumption that they intend to repeat it. The injunction therefore falls, and with it the right to damages. The Plaintiff may have a claim for damages on the ground of the user, which claim he might have brought forward in a common law action, but, instead of taking that course, he has brought a regular patent action in equity, for which there is no foundation, as there is no ground for supposing that the Defendants mean to infringe his patent.

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LOPES, L.J.:—

The only wrongful act alleged to have been committed by the Defendants was committed five years ago, and there has been no threat to repeat it. If that were all, it would be clear that the Plaintiff had shewn no case for an injunction. But the Defendants challenged the Plaintiff's right before the trial and at the trial and, for aught I know, up to the present time. I have felt great doubt whether the line taken by the Defendants, and the absence of any promise by them not to repeat their infringement, do not raise such an inference of intention to repeat it as to entitle the Plaintiff to an injunction. The other members of the Court, however, who are much more familiar with injunctions than I am, think that the Plaintiff has not made out any case for an injunction, and I do not differ from them, though I come to that conclusion with some hesitation.

Solicitor for Plaintiff: *A. Macdonald Blair, Manchester.*
Solicitors for Defendants: *Hall, Son, & Lord, Manchester.*

H. C. J.

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KAY, J.
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In re HENRY POUND, SON, & HUTCHINS.

Company — Winding-up — Debenture-holders — Appointment of Receiver by Debenture-holders—Application for Leave to Receiver to take Possession of all Company's Property—Discretion of Court.

A company issued debentures constituting a first charge on the whole of their undertaking and property, and empowering the holders, in the event of proceedings for the winding-up of the company, to appoint a receiver invested with very ample powers of carrying on the company's business, and managing and disposing of their undertaking and property.

An order was made for the winding-up of the company, and an official liquidator was appointed. The debenture-holders, under their powers, appointed a receiver and applied to the Court that, notwithstanding the appointment of the liquidator, the receiver might be at liberty forthwith to take possession of all the company's undertaking and property:—

Held, reversing the decision of *Kay*, J., that the Court ought not to interfere with the right of the debenture-holders to a receiver under their deed; and leave was given to the receiver appointed by them to take possession, notwithstanding the appointment of an official liquidator, but without prejudice to any question as to the powers of the receiver, other than the power to take possession and to sell the property.

ADJOURNED SUMMONS in the winding-up of the above company.

The Applicants, the *Debenture Corporation, Limited,* were the holders of the whole of the debentures issued by the company. There were two issues of such debentures, the first being for £15,000 in thirty debentures of £500 each, and the second for £5000 in ten like debentures.

One of the debentures of the first issue was payable on the 28th of December, 1888, another on the 28th of June, 1889, and the rest at subsequent dates down to and including the 28th of June, 1895. One of the debentures of the second issue was payable on the 25th of March, 1889, and the rest at subsequent dates down to and including the 29th of September, 1893.

By each of the debentures, the company covenanted to pay to the *Debenture Corporation* on a day specified, or on such earlier date as the principal moneys thereby secured should become payable, the sum of £500 and interest at 6 per cent., and the debenture continued as follows: "and the company doth hereby, as beneficial owner, charge with such payments, all its present and future capital, stock, goods, chattels and effects, and all its real property and interest in lands, including the amount uncalled on its shares already issued, or hereafter to be created or issued, and also all its present and future plant, machinery, stock manufactured and unmanufactured, book and other debts, goodwill and assets, and generally all the present and future property, real and personal, and undertaking of the company, all of which premises of every kind above specified are intended to be included in the term 'property' wherever used herein." There was a covenant by the company for further assurance; the holders of each issue of debentures were to be entitled to the benefit of the provisions contained in a trust deed; and the debenture was "issued upon and subject to the conditions indorsed hereon, which shall be and be read as part of this debenture, and which the company covenants to observe and perform in every respect." One of the conditions so indorsed was as follows:—"At any time after the principal moneys hereby secured shall have become payable according to the tenor of this debenture or under these conditions, or after a petition for winding up the company shall have been presented, or a resolution capable of being confirmed as a special resolution to wind up the company shall have been

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passed, or a notice shall have been given of a meeting to consider a proposed extraordinary resolution for winding up the company, or if judgment is recovered and enforceable against the company for any sum exceeding £100, or if judgment is recovered against the company for any less sum, and the company does not in such latter case within seven days from the date of the judgment pay or secure the judgment debt and costs, to the satisfaction of the creditor and of the corporation (and so that no delay or waiver of the right to exercise the powers hereby conferred shall prejudice the future exercise of such powers), the corporation may, at their own instance, or at the request in writing of the registered holders of one-fourth in value of the debentures of this issue outstanding, without further notice, by writing under its seal, appoint one or more persons to be a receiver or receivers of all or any part of the property hereby charged in like manner in every respect as if the corporation were mortgagees within the meaning of the *Conveyancing and Law of Property Act*, 1881, and had become entitled under that Act to exercise the power of sale thereby conferred, and every receiver so appointed shall have and be entitled to exercise all powers conferred by the said Act as if such receiver or receivers had been duly appointed thereunder, and in particular, by way of addition to, but without limiting any general powers hereinbefore referred to, every such receiver so appointed by the corporation shall have power to do the following things, viz.: (*a.*) Take immediate possession of the property hereby charged or any part thereof. (*b.*) Carry on any business or businesses of the company, and for that purpose to make or procure advances, and to secure the same with interest at 6 per cent. per annum by mortgage or charge in priority or subsequent to the principal moneys and interest secured by debentures of this issue, or otherwise, as may be thought expedient. (*c.*) Make and effect all repairs and insurances, and do all other acts which the company might do in the ordinary conduct of its businesses, as well for the protection as for the improvement of the property hereby charged. (*d.*) Appoint managers, officers, and agents for the aforesaid purposes at such salary as the corporation may determine. (*e.*) Sell all or any part or parts of the property hereby charged

in such manner, and generally on such terms and conditions, as he shall think fit. (*f.*) Let all or any part of the property hereby charged for such term and at such rent as he may think fit. (*g.*) Compromise any claim by or against the company. (*h.*) Call up all or any portion of the uncalled capital of the company. (*i.*) Use the name of the company in any proceedings. (*k.*) Give valid receipts for all moneys, and execute all assurances and things which he may think proper for realizing the property.

By the trust deeds for securing the debentures certain leasehold property was vested in trustees for the benefit of the debenture-holders.

On the 29th of March, 1889, a petition for the winding up of the company was presented, and on the 4th of May, 1889, a winding-up order was made. An official liquidator was appointed in due course.

On the 8th of April, 1889, the corporation demanded payment of the amount secured by their debentures (with the exception of one which had previously been paid off).

On the 10th of May, 1889, the corporation, under the powers vested in them by their debentures, duly appointed *John Annan*, chartered accountant, receiver of the property comprised therein.

This was a summons by the corporation asking that notwithstanding the appointment of the official liquidator, the receiver might be at liberty forthwith to take possession of all the undertaking and property, both real and personal, of every kind of the company.

The official liquidator of the company gave evidence to the effect that £23,500 was, to the best of his judgment, the smallest amount which the assets of the company would realize; that if he had the opportunity of realizing them he believed the amount realized would exceed that sum; and that he was willing to act as receiver on behalf of the Applicants. He expressed a fear that if the application succeeded the receiver would sell the whole assets for just about sufficient to satisfy the debenture debt, and so leave nothing whatever for the general body of creditors.

The summons came on for hearing before Mr. Justice *Kay* on the 29th of June, 1889.

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Rigby, Q.C., *Renshaw*, Q.C., and *Theobald*, for the Applicants:—

The receiver, duly appointed by the debenture-holders under the power contained in their debentures, is entitled to possession of the mortgaged property. The Court never interferes with the prior rights of mortgagees, and upon being apprised of such rights gives effect to them as a matter of course. We are entitled to the leave asked for *ex debito justitiæ;* and the only reason why it is necessary to ask for it is because the official liquidator, being the officer of the Court, cannot be ousted from possession without the leave of the Court. Under the powers in these debentures we might sell to-morrow.

[KAY, J.:—If the price was grossly insufficient, would the Court hand over the property to the purchaser?]

No; for such a sale would be a breach of trust, and the Court would not suffer it.

[KAY, J.:—The receiver appointed by the debenture-holders does not give security.]

We are in a position to give security; but we do not offer it, because we say our receiver comes in by right. If we had come to the Court asking for the appointment of a receiver the case would have been wholly different. Such receiver would be the officer of the Court, and the Court would impose such conditions as it thought fit in reference to his appointment. No doubt in such a case the Court, in the absence of reason to the contrary, would appoint the official liquidator receiver.

[KAY, J.:—When a winding-up order is made the rights of general creditors intervene.]

The winding-up order does not affect the prior rights of mortgagees. Notwithstanding the winding-up mortgagees are always permitted, in the absence of special circumstances, to proceed with any action for the enforcement of their security: *In re David Lloyd & Company* (1); *In re Longdendale Cotton Spinning Company* (2); *Jones* v. *Swansea Cambrian Benefit Building Society* (3); and see *General Share and Trust Company* v. *Wetley*

(1) 6 Ch. D. 339. (2) 8 Ch. D. 150.
(3) 29 W. R. 382.

Brick and Pottery Company (1). The *Companies Act*, 1862, provides a more convenient procedure for the winding up of companies, but does not alter rights.

[KAY, J.:—If, after a second mortgagee had obtained the appointment of a receiver, the first mortgagee sold out of Court, would the Court hand over the property to the purchaser?]

We submit the Court would be bound to do so, unless the sale were improper. But the analogy of a redemption action by a second mortgagee does not apply, because the first mortgagee would be a party to such an action. The Court cannot interfere with or administer the rights of persons not before it; the moment it finds that its action affects such rights it alters its procedure accordingly: see *Searle* v. *Choat* (2).

[KAY, J., referred to *Langton* v. *Langton* (3).]

From the earliest times the Court has declined to interfere with the legal rights of a first mortgagee; and if a second mortgagee applied for a receiver the order has always been made without prejudice to the first mortgagee's right to possession, which he may proceed to obtain if he thinks proper: *Angel* v. *Smith* (4); *Brooks* v. *Greathed* (5); *Bryan* v. *Cormick* (6); *General Share and Trust Company* v. *Wetley Brick and Pottery Company*. He may come at any time: if he delays to do so, proceedings taken in the meantime may be binding on him to some extent, but when he does come, the Court at once recognises his paramount right. There is no suggestion that this receiver is not a proper person, of whom the Court would approve. It is the interest, as it is the right, of the debenture-holders to select a fit person. The debentures in terms refer to the power of appointing a receiver conferred by the *Conveyancing Act*, 1881: sect. 19 of that Act is silent as to any personal qualification of the receiver.

Marten, Q.C., and *John Chester* for the official liquidator:—

This application ought either to be refused, or, if the Appli-

(1) 20 Ch. D. 260.
(2) 25 Ch. D. 723.
(3) 7 D. M. & G. 30.
(4) 9 Ves. 335.
(5) 1 Jac. & W. 176.
(6) 1 Cox, 422.

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cants so desire, the official liquidator should be appointed receiver on their behalf. Where a company is in liquidation, the Court, whether under the jurisdiction conferred by sect. 163 of the Companies Act, 1862, or under its general jurisdiction, exercises a control over the rights of mortgagees and debenture holders, regarded in the light of secured creditors of the company, and deals with the possession of the company's property, notwithstanding such rights: *Perry* v. *Oriental Hotels Company* (1); *Campbell* v. *Compagnie Générale de Bellegarde* (2); *Tottenham* v. *Swansea Zinc Ore Company* (3); *Willmott* v. *London Celluloid Company* (4); *In re Brown, Bayley and Dixon* (5).

[KAY, J. referred to *Boyle* v. *Bettws Llantwit Colliery Company* (6).]

Mainland v. *Upjohn* (7), and *James* v. *Kerr* (8) are instances of the general control which the Court exercises over mortgagees. If this receiver, under the very wide powers conferred by these debentures were allowed to take possession, the effect would be to stop the winding-up altogether. The Court, in the exercise of its discretion, will not, in the absence of special reason, interfere with the possession of the official liquidator, who is practically the receiver of the Court on behalf of all persons interested, and whose duty it is to have regard to the interests of the debenture-holders as well as those of the general creditors. In the cases of *In re David Lloyd & Company* (9), and *In re Longdendale Cotton Spinning Company* (10), the sole question was whether the mortgagee should be allowed to go on with his action; there was no attempt to interfere with the possession of the Court by its officer the official liquidator, and the previous cases as to possession were not referred to: *General Share and Trust Company* v. *Wetley Brick and Pottery Company* (11) was the case of a landlord claiming possession of that which had become his absolute property by reason of the winding-up.

(1) Law Rep. 5 Ch. 420.
(2) 2 Ch. D. 181.
(3) 53 L. J. (Ch.) 776.
(4) 52 L. T. (N.S.) 642.
(5) 18 Ch. D. 649.
(6) 2 Ch. D. 726.
(7) 41 Ch. D. 126.
(8) 40 Ch. D. 449.
(9) 6 Ch. D. 339.
(10) 8 Ch. D. 150.
(11) 20 Ch. D. 260.

Here the debentures are a mere floating charge, equitable only (except as to the leaseholds), affecting the whole of the company's property, and the case is very different from that of a mortgage of a specific part of the company's property: see the observations of *Lindley*, L.J., in *Jones* v. *Swansea Cambrian Benefit Building Society* (1), and the officer of the Court is the fittest person to be intrusted with the realization; see *Lindley* on Company Law (2). The cases under the old practice, as to not interfering with the rights of mortgagees, have little weight now that legislation has vested such ample powers in the official liquidator. He can do many things which this receiver cannot; for instance, he can deal with the outstanding legal estate. To have two receivers would be a useless expense. The Applicants are applying under sect. 87 of the *Companies Act*, 1862, for leave to take proceedings, and by so doing admit that the Court has a discretion in the matter.

Under the *Conveyancing Act*, 1881, sect. 25, the Court has now the fullest powers to direct in any action a sale of mortgaged property, and, in its discretion, might give direction in the winding-up for the institution of a redemption action.

Rigby, in reply:—

The cases cited as to possession have no bearing; every one of them was decided on principles which were well-known before the *Companies Act*, 1862, was passed. In principle, this case is not distinguishable for the present purpose from the winding-up of an ordinary partnership, where the Court acquires jurisdiction only over the equity of redemption belonging to the firm, and the rights of the mortgagees of the firm are not affected. The fact that the debentures comprise the whole of the company's property cannot diminish the rights of the debenture-holders; it is merely a matter of parcels. The Conveyancing Act was not intended to enable the Court, by directing an action for redemption to be brought, to attract to itself a jurisdiction which would deprive mortgagees of their rights. *In re Brown, Bayley and Dixon* (3)

(1) 29 W. R. 382, also reported 50 L. J. (Q.B.) 428 *sub nom. Andrew* v. *Swansea, &c., Building Society.*

(2) 5th Ed. p. 675.

(3) 18 Ch. D. 649.

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went on the ground that the mortgagees there were in the same position as a landlord, and was decided under sect. 163 of the Act of 1862, which has no application to the present case.

KAY, J.:—

This application raises a question of the highest importance with respect to the rights of mortgagees. [His Lordship stated the facts of the case down to and including the winding-up order, and continued:—] An official liquidator was appointed in due course, and on the 10th of May, 1889, the Applicants, the *Debenture Corporation*, appointed a receiver under the power in the debentures. No objection has been made to the gentleman whom they appointed, who, I understand, is an accountant, and of course the corporation, although he has given no security, would be responsible for any receipts by him. Therefore, if he took possession of the property, there would be such security as the corporation could give, and they are entitled practically to nearly the whole of this company's property, because it is a question whether the property of this company would realize much more than enough to pay the debentures, and there would be the security of the whole of the property for the receipts of such receiver.

Now, then, an application is made that the Court should, notwithstanding the winding-up, hand over the whole of the property of the company to this receiver, and naturally the first observation which arises is that that would put a complete stop to the winding-up, and, moreover, the receiver might, under the powers which the debentures give him, if he thought well, carry on the business for any time he liked, and in fact resuscitate the company; he might carry on the business for years and years just as if there were no winding-up order in existence; he might also exercise the power of sale, provided he did so without fraud or impropriety; he might sell for just enough to pay the debenture debt or for less, if he were so minded, and the Court could not interfere with any *bonâ fide* exercise of his power. The liquidator has filed an affidavit in which he suggests that, if the winding-up is continued by the Court, there is a probability, according to his view, that there will be enough to pay the

debenture debt, and something over to pay the creditors of the company.

Now, in that state of things the question is, what is the Court to do? The application admits, and the argument admits, that the receiver appointed by the debenture-holders cannot possibly interfere with any of the assets of this company without the leave of the Court. The official liquidator is an officer of the Court; he is practically in the position of a receiver appointed by the Court, and it would be a contempt of Court for any one to interfere in any way with his possession without the leave of the Court. Therefore, before these mortgagees can put their receiver into possession, they must obtain the leave of the Court, and the object of this application is to obtain that leave. The argument goes so far as this—that the Court has no right whatever to refuse that leave. That is rather further than, I think, the argument can be pressed. For instance, supposing this receiver appointed by the mortgagees were a person into whose hands, for personal reasons, the Court did not like to commit the custody of the property of this company, without doubt the Court would decline to allow the assets to be endangered and would, for that reason, refuse this application. But must there be some reason like that, or equally forcible, to prevent the Court from interfering? If these debenture-holders had brought their action, and in that action asked for the appointment of a receiver, after the Court had appointed an official liquidator, the Court would appoint the official liquidator their receiver, and would not appoint another receiver. That has been for a long time the settled practice of the Court. One ground for that is that the Court would not go to the expense of having two receivers at the same time, one for the ordinary creditors of the company—the official liquidator, and the other over his head, for the mortgagees; and another reason is that, where an official liquidator has been appointed, it is his duty to guard the interests of the mortgagees just as much as those of any other class of creditors, and unless there were a conflict between the interests of the mortgagees and those of other creditors (and nothing of the kind is here suggested), there would be no reason in the world why an additional receiver to the liquidator should be appointed.

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The course of the Court has always been to say, upon an application of this kind by an equitable mortgagee or debenture-holder for the appointment of a receiver, that the liquidator shall be appointed such receiver. That is to make him in a special sense receiver for the mortgagees, as well as the official liquidator in the winding-up; and I observe that the Court guards the interests of the mortgagees, when it does that, very carefully. In the case of *Perry* v. *Oriental Hotels Company* (1) Lord Justice *Giffard* did follow that course; he appointed the official liquidator to be receiver upon the application of an equitable mortgagee; and Vice-Chancellor *Wickens*, in the very same case, in the next year (2), had to consider what the effect of that appointment was, and he held that the costs of the realization of the property would be payable in the first instance out of the funds realized, in priority to any claims of the debenture-holders or of the plaintiff; and next that the claims of the plaintiff as mortgagee, and of the debenture-holders were to have priority over the general costs of the liquidation, and then as between the mortgagee and the company, the costs of preservation were payable by the company; but the liquidator was entitled to be indemnified out of the proceeds of the particular property mortgaged against any costs of preservation which he might not be paid out of the assets of the company. That is guarding most carefully the position of the mortgagee, and not allowing him to be prejudiced to any extent by costs incurred in the liquidation which would not have been incurred if there had been a judgment for realization of the property at his instance, and it had been realized under that judgment.

Cases have been referred to in which the rights of a mortgagee of the property of a company have been placed on a very high ground indeed, notwithstanding an order had been made to wind up the company. The case principally relied on is *In re David Lloyd & Co.* (3), which came before the Court of Appeal. That was the case of a colliery company, and there was an equitable mortgage created by deposit for securing £40,000 unpaid purchase-money. Afterwards a resolution was passed to

(1) Law Rep. 5 Ch. 420. (2) Law Rep. 12 Eq. 126.
(3) 6 Ch. D. 339.

wind up the company, and liquidators were appointed in the voluntary winding-up, and, later on, the equitable mortgagee commenced an action to realize his security, and then, pending that action, an order was made for continuing the winding-up under the supervision of the Court. Then notice of motion was given in the winding-up and in the action, for liberty to proceed with the action notwithstanding the supervision order. The case came in the first instance before one of the Vice-Chancellors, and he refused the application. Then it came before the Court of Appeal, and the then Master of the Rolls, Sir *George Jessel*, said (1): "The real question is on what terms leave ought to be given to a mortgagee to proceed with or commence an action against a company for realizing his security when the company is being wound up, either compulsorily or under a supervision order. Now, as a rule, a mortgagee has a right to realize his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say he should be restrained from bringing or proceeding with such an action must either shew some special ground for restraining him, or must say, 'We can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceeding in the action.' That, of course, would be a reason for refusing leave to proceed with an action if commenced, or for not giving leave to commence a threatened action. But, short of that, it appears to me that the Court ought not under the 87th section of the Act to interfere with the rights of a mortgagee. In the present case there are no special circumstances whatever which make it inequitable for the mortgagee to prosecute his action, and no terms, either reasonable or unreasonable, are suggested on the part of the official liquidator for putting an end to it." Now I observe that in that case the thing mortgaged was a specific part of the real property to which the company was entitled,—the colliery, the deeds of which were deposited. Lord Justice *James* says this,—and it is upon his language chiefly that reliance is placed—(2) "These sections in the *Companies Act*, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of

(1) 6 Ch. D. 343. (2) 6 Ch. D. 344.

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harassing, or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. The position of a mortgagee under such circumstances is, to my mind, exactly similar to that of a man who said 'You, the company, have got property which you have taken from me; you are in possession of my property by way of trespass, and I want to get it back again.' A landlord might say, 'You have property under lease from me; you have broken the covenants of the lease, and I have a right of re-entry in consequence of that breach.' The company ought not, because it has become insolvent or has been minded to wind up its affairs, to be placed in a better position than any other lessee with regard to his lessor. So with regard to a mortgagee. The mortgagee says, 'There is some property upon which I have a certain specific charge, and I want to realize that charge. I have nothing to do with the distribution of your property among your creditors, this is my property.' Why a mortgagee should be prevented from doing that I cannot understand." Now those words are used by his Lordship in reference to an equitable mortgage of a definite subject of real estate part of the company's property. Would those words have been used in the same way, upon an application like this, where the mortgage is not of that kind, but of every item of property which the company possesses at the moment when the receiver is appointed by the mortgagee? Everything this company possesses in every kind of way, future calls, if there are any future calls, all its assets and business, and everything that can be conceived, seem to be comprised in the words of these debentures. All this property

is now in the possession of the Court, which has said that the business of this company shall go on no longer, has directed that it shall be realized, and has put it into the hands of its own officer for realization for the benefit not merely of the general creditors but, among others, of the holders of these very debentures.

When the winding-up petition was presented, it was advertised. The meaning of the advertisement was that every one who chose, who was interested in the company—debenture-holders or anybody else—might come and oppose or support the petition as they were minded; and in that sense the winding-up order was made in the presence of these very debenture-holders; because, if not there by counsel, they were in the position of parties having notice of the application, but who did not choose to be present. I do not mean to say that that takes away from them all the rights they have, but it puts them very nearly in the position of first mortgagees in whose presence an order has been made in a redemption or foreclosure action for the realization of the mortgaged property. I mean supposing the mortgagor or a subsequent mortgagee had brought an action against the first mortgagees to redeem them and to foreclose the property, and under the powers which the Court now has under the *Conveyancing Act*, 1881, and formerly had under 15 & 16 Vict. c. 86, s. 55, the Court had, in the presence of the first mortgagees, ordered a sale of the property, and realization for the benefit of the first mortgagees and everybody else concerned, and then under the power in their mortgage, the first mortgagees had, as in this case, appointed a receiver after the judgment, and had come to the Court to say, "Hand over the property to our receiver," it is obvious that no such thing would be done. I agree that the difference there would be that the order would be an order expressly binding on the first mortgagees, who, upon the hypothesis made, were actual parties to the action, and in whose presence an order was made for the realization. The analogy is not perfect, but it is the nearest I can think of. Here an order has been made for the realization by the Court of all the property of the company included in the mortgage, for putting an end to this business and preventing its being carried on any longer, determining as

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at the date of the commencement of the winding-up, the rights of general creditors as of everybody else concerned or interested in the property, and fixing those rights; because for many purposes it has been held again and again that after a winding-up order has been made, the general creditors have rights in the property which before the order was made they had not; they are then very much in the position of persons who have an effective judgment against all the property of the company, subject of course to the prior rights of the debenture-holders and any outside mortgagees.

Now I repeat I have not to deal now with the case of a mortgagee of specific real estate, part of the company's property, who is seeking to have realization of that by a suit, and that such suit should not be interfered with by the winding-up order. That is not the case before me. The case is that of an equitable mortgagee—legal, perhaps, by virtue of the trust deed as to some part of the property, but equitable as to the rest—seeking to take every farthing of these assets out of the hands of the official liquidator, and put them in the hands of a person appointed by himself, who has given no security and for whose dealings the Court has no security except the solvency of the limited company which is making the application. Thinking as I do that the Court has a discretion in a matter of this kind, and that the case of *In re David Lloyd & Co.* (1) is not exactly in point, I conceive that the Court should exercise its discretion very carefully and cautiously.

What, then, is the sensible thing to do? If this corporation had brought an action, whether before or after the winding-up, and had come after the winding-up and asked for the appointment of a receiver, the settled practice is that the official liquidator, and no other would be appointed such receiver, unless there were some strong reason, which has not been suggested in this case, for not appointing him. If the mortgagee of a specific part of the company's property asked leave to prosecute an action for the realization of his security, notwithstanding the winding-up, the Court would allow him to do so; but I have never yet heard of a case in which, where the property included in the mortgage

(1) 6 Ch. D. 339.

was not a definite and specific part of the company's property, but the whole of the property of whatever nature, the Court has said, because the mortgagee has by contract a right to appoint a receiver, if he lies by and allows a winding-up order to be made, he may, after the winding-up order, appoint a receiver and thus put an end to the winding-up by compelling the Court to hand over all the property to his receiver. In my opinion that would be a course which might be for the benefit of the mortgagee, but which most probably would be greatly to the injury of the other creditors on whose behalf the Court has taken possession. I should hesitate to allow the rights of a mortgagee to be enforced in that way, and to that extent. I think the Court in a case of that kind has a discretion. The only point before me now, is whether I ought to hand over all the property of this company—every item of it—to the receiver appointed by the mortgagees since the winding-up commenced. I am of opinion that that would not be a right thing to do, and, in the exercise of the discretion, which I conceive the Court has, I decline to do it.

But then the official liquidator is the officer of the Court, and at the same time I have a perfect right to say that I will appoint him receiver on behalf of these debenture-holders, if that is necessary to make his position as their receiver, as well as receiver for the other creditors, more clearly defined. I shall direct him to treat himself as the receiver, in the first instance, of the debenture-holders. Also I think another direction ought to be given in this winding-up, namely, that this corporation, who, I understand, hold all these debentures, should have a right to attend the proceedings in the winding-up until their debentures are satisfied. Then, as to costs, I do not think that the application was at all unfounded, and I think it is right that the costs of the debenture-holders should be added to their security. The costs of the liquidator will be reserved, and I shall deal with them according to the event.

C. C. M. D.

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From this judgment the Applicants appealed.

The appeal was heard on the 8th of August, 1889.

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Rigby, Q.C., *Renshaw*, Q.C., and *Theobald*, for the Appellants, referred to *Langton* v. *Langton* (1), and *In re David Lloyd & Co.* (2).

Marten, Q.C., and *John Chester*, for the official liquidator, cited *Perry* v. *Oriental Hotels Company* (3); *Campbell* v. *Compagnie Générale de Bellegarde* (4); *In re Brown, Bayley, & Dixon* (5); *Tottenham* v. *Swansea Zinc Ore Company* (6).

At the conclusion of the argument for the Respondent,

COTTON, L.J., said:—

Mr. *Rigby*, we think there are a good many powers that this proviso purports to give to the receiver which cannot be exercised by him, or at any rate it is very questionable whether they can be; but what we propose (and if you are satisfied with this we need not hear you in reply) is this: Order that Mr. *John Annan* as receiver of the applicants be at liberty forthwith to take possession of all the undertaking and property both real and personal, of any kind belonging to the company; but this order is to be without prejudice to any question which may be raised by the company as to the powers of the receiver other than the power to take possession of the property, and to sell all or any part of it.

Rigby:—I admit that the Court has a certain control over the property. I have no objection to what your Lordships propose.

COTTON, L.J.:—

This is an appeal against an order made by Mr. Justice *Kay*, and it is one of a somewhat extraordinary nature. The debenture-holders under their debentures had, by contract with the company, a right to appoint a receiver, and that receiver represented the debenture-holders for the purpose of taking possession of the property, and for the purpose of selling the property if he were so advised. It also gave him various other powers.

I think the fact that the company has been wound up does prevent a good many of those powers being exercised; but that,

(1) 7 D. M. & G. 30.
(2) 6 Ch. D. 339.
(3) Law Rep. 5 Ch. 420.
(4) 2 Ch. D. 181.
(5) 18 Ch. D. 649.
(6) 53 L. J. (Ch.) 776.

to my mind, in no way interferes with the mortgagees' receiver taking possession. Now this property being on mortgage, the mortgage not being in any way disputed, and its nature not being disputed, it comes to this, that it was a charge, not exactly a legal mortgage, on the whole property of the company; and it is not said that such a security as that is null and void. As part of this security there was to be a receiver appointed who was to take possession and to sell. The argument has been this, that in this case, if the receiver is only to have such a power as a receiver appointed by the Court in an action would have, he must be treated for the purposes of this application as if he were a receiver appointed by the Court. That appears to me to be entirely missing the point. If the Court appoints a receiver at the instance of a mortgagee, the mortgagee not having, without the assistance of the Court, power to appoint a receiver, then the Court exercises its discretion as to who shall be appointed receiver, and appoints the receiver whom it thinks best to appoint for the interest of the mortgagee and of the mortgagor, a person who, having regard to the interests of both parties, the Court considers the best person. And when a company is being wound up, whether there is a winding-up at the time the receiver is appointed by the Court or afterwards, then the Court says, "It is quite useless to have the expense of two receivers, the liquidator who is, in fact, in some senses a receiver, and another receiver appointed in this action." There the Court exercises its discretion as to whom it is to appoint. But those cases do not at all apply, in my opinion, where a receiver who is asking to be let into possession, has not been appointed by the Court, but is appointed by the mortgagees under the exercise of the power given them by the mortgage deed. In such a case it is not left to the Court to determine who shall be the receiver best for the interest of all parties, but the mortgagee comes and says: "My deed enables me to appoint *A. B.* and I have appointed him and I ask the Court to let him into possession; that being one of the powers which were given to the receiver by the deed; I do not want a receiver appointed by the Court, but a receiver appointed under the powers conferred by the deed under which I claim."

Then it is said, "If that is so, why do the debenture-holders

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apply to the Court in respect of their receiver at all; that is an admission that the Court has a discretion?" That is not so. The reason is this—a person having a right to a property which is in the possession of an officer of the Court, cannot, if he could otherwise take possession, take possession without leave of the Court so as to dispossess the officer of the Court who is in possession. It has been argued by Mr. *Chester* that this was an application under sect. 87 which says, "No suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court." That is an entire mistake. If some words which were used in the argument on the other side in the Court below gave rise to any such impression, I think that must have been a mistaken impression. Certainly nothing has been said either by Mr. *Rigby* or by Mr. *Renshaw* to lead to the suggestion that they were applying with reference to that section; but it is this,—that they would be guilty of contempt of Court if a receiver had been appointed under this deed and if, after the appointment of the liquidator, and after the liquidator was in possession, he had taken possession of that which the liquidator, the officer of the Court, held. That is the reason why they must apply to the Court to enable them, notwithstanding the possession of the officer of the Court, to exercise the rights which they have under their own deed.

But it is said that this will put an end to the winding-up, and that it will entirely withdraw the winding-up from the control of the Court. To some extent no doubt it would, where a company which is being wound up has entirely parted with all its property, by giving a simple mortgage over the whole of it. That would paralyze the winding-up and would paralyze the action of the liquidator, and would certainly take away any provision for the costs of the liquidation; and this might be the case even although the mortgage did not include (as this does) various chattels which are necessary and important for carrying on the business of the company. No doubt that would be a very awkward position for those engaged in the liquidation, and I have seen myself several instances in which all the property has gone, and the liquidator has not been able to do anything effectual or useful in the winding-up of the company, except

selling something like the goodwill or something of that shadowy sort.

But I do not think that here the receiver appointed under this deed (who is there called a receiver, which raises the presumption that he is like a receiver appointed by the Court), can do all the things which are mentioned in the stipulation contained in the debenture, because he certainly cannot carry on the business of the company after the winding-up; he cannot make calls; he cannot use the company's name in any proceedings. There are a great variety of things which we do not interfere with by allowing the receiver to take possession, for this reason, that, so far as my present information goes, the altered position of the company is such as to prevent various things which this deed authorizes the receiver to do, being done. Therefore, I think it is the right of the mortgagees or the debenture-holders (I treat them as mortgagees) to take possession of the mortgaged property, the winding-up not in any way interfering with that, or with their selling the property, and the liquidator still being enabled for the purpose of the winding-up, to employ and use in carrying on the business of this company, as he may do for the purpose of the winding-up, that which is not the property of the company, but which is the property of the debenture-holders, that is to say, the mortgagees.

I cannot understand, I must say, with great respect, how Mr. Justice *Kay* could appoint the liquidator receiver, because there was no action in which any receiver could be appointed by the Court, and if he did not give to the receiver appointed under this deed what I think was the right of the debenture-holders to take possession of, I cannot see how he could appoint the liquidator to be a receiver on behalf of the debenture-holders.

What I think we ought to do will be to discharge the order, and to make an order for liberty for the receiver to take possession, adding that saving clause which Lord Justice *Fry* has sketched out, and which I have already read.

FRY, L.J.:—

Substantially this appears to me to be simply an application to the Court by a mortgagee for leave to take possession of the

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property which is in the custody or power of the officer of the Court. There is a difference which I will presently advert to between such an application and the present; but in substance it appears to me an application of this nature.

Now, where property is in possession of an officer of the Court, and there are legal or equitable rights in that property not vested in the parties to the action or the persons who are before the Court, which legal or equitable rights are not the subject of the administration then going on, then the Court requires that the person who claims to enforce those rights shall apply for leave to enforce them. The right may be a right to take possession, or a right to bring an action, or a right to do various other things; but the Court requires an application to be made to it.

On what principle would the Court proceed in considering whether that application should be granted? I conceive that it proceeds on the principle of paying the utmost respect to the legal or equitable rights of the persons whose interests are not being administered in the proceedings before it. If it were to do otherwise, this result would follow—that the rights of a stranger to the litigation would be diminished by the pendency of that litigation, and that the rights of the parties to the litigation would be increased and improved by the pendency of that litigation, a result which is obviously unjust and which the Court ought never to arrive at, and a result at which, in my judgment, the Court never yet has arrived. That principle is expounded very fully by Lord Justice *James* in the case of *In re David Lloyd & Co.* (1) which has been already referred to. There, as he points out, and as I have endeavoured to repeat here, the anxiety of the Court must be, whilst requiring the application, not to interfere with or diminish the rights of the outsiders.

Now it appears to me that this was substantially an application for leave to take possession by a person who has a right to possession, and I do not think that the Court has any ground for interfering with that right. The discretion which is exercised on an application of this description differs *toto cœlo* from the discretion to be exercised where the Court is applied to to appoint a receiver. Where that is the case, the Court has before it,

(1) 6 Ch. D. 339.

assuming it to be an application by a mortgagee, both mortgagee and mortgagor, and it has regard to the rights of all the litigant parties before it. In that way where the mortgagor happens to be a limited company which is in course of winding-up, the Court has, on the ground of convenience, and on the ground of saving expense, frequently appointed the liquidator to be the receiver: in that case there is an application made by the mortgagee to the discretion of the Court, and he cannot object to the discretion of the Court being exercised.

The argument in this case seems to me to be based merely upon confusion between two kinds of application, namely, between an application to enforce the right of a stranger, and an application to the discretion of the Court by a litigant asking to have a receiver appointed by it. I have said that this case is not the simple case of a mortgagee applying for leave to take possession. It differs in this way, that in the debentures which were issued under which the Applicants claim, power is given, not to take possession by themselves, but to appoint a receiver for the purpose of taking possession. Probably that was inserted on the ground of convenience. It may be because the mortgagees were a limited company, which would probably act more easily through the intervention of an agent than by themselves. In fact they can only act by an agent. Therefore the deed gives a power to the mortgagees to appoint a receiver to take possession; but that receiver appointed to take possession is a mere agent of the mortgagees; and I can see no reason why we should not give possession to the agent of the mortgagees as well as give possession to the mortgagees themselves.

But then it is said, "the powers of the receiver are very large, and some of those powers necessarily come to an end in the event and on the happening of a winding-up order being made." Well that may or may not be the true construction of the deed; with the Lord Justice I incline to take the view that that is so, and that some of the powers will not continue after the winding-up of the company; but that point does not appear to me to require decision. There has been no argument addressed to us to shew that the power to take possession is one which necessarily comes to an end on the winding-up of the mortgagors; and Mr. *Marten*

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has, I think, very wisely and properly disclaimed any intention to impeach the whole deed.

The deed therefore stands as a valid one, although according to its true construction it may be that some of the powers cannot be exercised.

I think therefore that the order which the Lord Justice has suggested is the right one.

LOPES, L.J.:—

I am of the same opinion.

Solicitors for the Applicants: *Linklater, Hackwood, Addison, & Brown.*

Solicitors for the Liquidator: *Bonner, Wright, Thompson & Co.*

M. W.

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[1888 C. 2561.]

Solicitor and Client—Costs—Taxation—Statute of Limitations—Acknowledgment of Debt—Implied Promise to pay—Authority of Solicitor.

The Plaintiff being dissatisfied with his solicitor (the Defendant), instructed other solicitors, and signed in 1888 a document by which he authorized and requested the new solicitors to obtain and receive from the Defendant all deeds and other documents belonging to the Plaintiff in the possession, custody, or power of the Defendant as the Plaintiff's solicitor, and also to obtain and receive from the Defendant an account of his dealings and transactions with the Plaintiff's land, &c., "since he was appointed my solicitor many years ago, or for such other period as you may think fit." And the Plaintiff thereby authorized and requested the Defendant to deliver up to the new solicitors all such deeds, &c., and such account as aforesaid. The new solicitors wrote to the Defendant, sending him a duplicate of this document, and requesting him to comply with it. Some correspondence took place, in the course of which the Defendant wrote: "Does your client require my bill of costs from the date when I became his sole agent, or how otherwise?" The new solicitors on the 26th of June replied, "Our client only requires you to deliver particulars of any unsettled bill of costs you may have against him." On the 4th of July the Plaintiff issued an originating summons against the Defendant, asking for the delivery and taxation of the Defendant's bill of costs and the delivery up of deeds, &c., and not containing any submission by the Plaintiff to pay what should

be found due on the taxation. On the 31st of July an order was made for the delivery to the Plaintiff by the Defendant of "a bill of his fees and disbursements in all suits, causes, or other matters of business in which he has been employed as the attorney or solicitor for the Applicant," for a reference to the Taxing Master to tax "the said bill," and for payment of the sum certified to be due from the Plaintiff to the Defendant, or the Defendant to the Plaintiff. Liberty was given to the Plaintiff to pay into Court £350, and upon doing so his documents were to be given up to him by the Defendant, and the Defendant's lien was to attach to the sum paid in. On the taxation of the bill delivered under this order the Taxing Master struck out certain items (without considering their propriety) on the ground that, having regard to their dates, they were barred by the *Statute of Limitations*. On a summons to review the taxation:—

Held, by *North*, J., that the letter of the 26th of June amounted to a sufficient acknowledgment to take the case out of the *Statute of Limitations*; that the Plaintiff's new solicitors had authority to make the acknowledgment on his behalf; and that, consequently, the Taxing Master ought to have taxed the items which he had struck out.

Whether, under the common order obtained by a client to tax his solicitor's bill of costs, the Taxing Master ought to strike out (without taxing them) all statute-barred items, *quære*.

Quincey v. *Sharpe* (1), and *Skeet* v. *Lindsay* (2) followed.

Held, by the Court of Appeal, that the object of the order of the 31st of July was to ascertain the amount of costs for which the Defendant had a lien, and that it was the duty of the Taxing Master to tax all the items of the bill, without regard to the *Statute of Limitations*.

SUMMONS by a solicitor to review a taxation of costs.

The Plaintiff, the Rev. *H. Curwen*, had for many years employed the Defendant, *Tom Milburn*, as his solicitor. In June, 1888, the Plaintiff became dissatisfied with the Defendant, and he instructed Messrs. *Paisley & Falcon* to act as his solicitors, and on the 16th of June he signed the following written authority addressed to them: "I do hereby authorize and request you to obtain and receive from Mr. *Tom Milburn*, of *Workington*, solicitor, all deeds, books, papers, and documents in the possession, custody, or power of the said *Tom Milburn* belonging to me, or in any way relating to my manor of *Priestgate*, in the parish of *Workington*, in the county of *Cumberland*, and also all other deeds, books, papers and documents in the possession, custody, or, power of the said *Tom Milburn* belonging to me, or in any way relating to the lands, tenements, hereditaments, matters, actions, things, and premises in which I am in any way interested, and

(1) 1 Ex. D. 72. (2) 2 Ex. D. 314.

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of which the said *Tom Milburn* has the possession, custody or power as solicitor for me. And also to obtain and receive from the said *Tom Milburn* an account of his dealings and transactions with my lands, tenements, hereditaments, matters, actions, things and premises since he was appointed my solicitor many years ago, or for such other period as you may think fit. And I hereby authorize and request the said *Tom Milburn* to deliver up to you all such deeds, books, papers and documents as aforesaid, and such account as aforesaid."

On the same day *Paisley & Falcon* wrote to the Defendant, sending with their letter a duplicate of the above written authority from the Plaintiff. In their letter they said, "if you claim to have any lien upon the deeds, books, papers, and documents of our client, we request that you will be good enough to deliver us full particulars thereof without delay, in order that we may take the instructions of our client thereon." Some correspondence followed between *Paisley & Falcon* and the Defendant, and some delay took place in consequence of his being engaged on other business which took him away from home. On the 20th of June, *Paisley & Falcon* wrote again to the Defendant asking for an immediate appointment for delivery up of documents, and this request was repeated on the 25th of June.

On the 26th of June the Defendant wrote to *Paisley & Falcon* saying, "You shall have an appointment before the end of the week. Does your client require my bill of costs from the date when I became his sole agent or how otherwise?" On the same day *Paisley & Falcon* replied, "Our client only requires you to deliver particulars of any unsettled bill of costs you may have against him. We suppose all other bills of costs and items of account will appear in your ledger or cash accounts which we require. We again ask you for an early appointment for delivery up of our client's deeds, books, papers, and documents." On the 2nd of July, the Defendant handed over to *Paisley & Falcon* some documents belonging to the Plaintiff. The Plaintiff was not satisfied, and on the 4th of July, 1888, he issued an originating summons by himself as Plaintiff against *Milburn* as Defendant, asking for the delivery and taxation of the Defendant's bills of costs, and delivery up of deeds and other documents.

The summons did not contain any submission by the Plaintiff to pay what might be found due from him on the taxation. On this summons an order was made at Chambers on the 31st of July, 1888, whereby, the Plaintiff undertaking to pay any additional costs caused by his proceeding under Order LV. rather than by petition of course, it was ordered that the Plaintiff should pay such additional costs to be taxed by the Taxing Master. "And it is ordered that the Defendant do on or before the 1st of October, 1888, or subsequently within fifteen days after service of this order, deliver to the Applicant a bill of his fees and disbursements in all suits, causes, or other matters of business in which he has been employed as the attorney or solicitor for the Applicant, and that it be referred to the Taxing Master to tax and settle the said bill." The order proceeded in the common form to direct production of documents and examination of the parties, to order the Defendant to give credit for all moneys received from the Plaintiff, and to be at liberty to charge all moneys paid to or for the account of the Plaintiff, and to direct taxation of the Plaintiff's or of the Defendant's costs of the application and reference according as less or more than one-sixth was taxed off, provided that the Plaintiff's costs of the application and reference, if payable by the Defendant, were to include only such costs as would have been incurred if the Plaintiff had proceeded by petition of course. "And it is ordered that the said Master do certify the amount due from the Applicant to the said Defendant, or from the said Defendant to the Applicant, as the case may be, having regard to the costs of this application and of such reference so to be taxed as aforesaid, and any sum or sums of money which may have been so received or paid as aforesaid, and it is ordered that the amount so to be certified be paid within twenty-one days after service of this order and of the Taxing Master's certificate to be made in pursuance thereof, unless the Court shall upon special circumstances to be certified by the Master otherwise order." And it was ordered that the Plaintiff should be at liberty to pay into Court the sum of £350, and thereupon that the Defendant should deliver over to the Plaintiff on oath, on or before the 1st of October, 1888, all deeds, &c., in his custody or power belonging to the

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Plaintiff, and, the Plaintiff so requesting and the Defendant by his solicitors assenting, it was ordered that the Defendant should within fifteen days after the payment into Court hand over to the Plaintiff such documents as the Plaintiff might by himself or his solicitors designate as wanted for immediate use. And it was ordered that the existing lien of the Defendant upon the documents in his possession should attach to the sum of £350 when paid into Court, and that the delivery over of such documents by him to the Plaintiff should be also without prejudice to the lien.

Under this order the Defendant delivered his bill of costs and it was taxed by the Master. On the taxation the Master struck certain items out of the bill (without considering the propriety of them as charges) on the ground that, by reason of the dates at which they had been incurred, the Defendant's right to sue for them was barred by the *Statute of Limitations.*

The Defendant took the following objections to the taxation: "As to the parts of the bill of costs disallowed by the Master on the ground that they were statute-barred, the Defendant contends that they were not statute-barred upon the following grounds (*inter alia*):—

"(1.) Because the Defendant had a lien for his costs, and such lien is not affected by the *Statute of Limitations.*

"(2.) Because the delivery up of papers and documents already handed over has been without prejudice to any question of lien.

"(4.) Because the correspondence, especially the letter of the 26th of June, 1888, of Messrs. *Paisley & Falcon,* amounts to an acknowledgment from which a promise to pay must be inferred sufficient to take the case out of the statute."

The Taxing Master gave the following answers to the objections:—

"The question of lien is not one for the Taxing Master, and does not render it incumbent upon him to tax a bill barred by the statute, or open to valid objection of any other description than that of amount. No evidence has been produced which in my opinion (based upon the cases to which my attention has

been directed) is sufficient to take the disallowed items out of the statute."

The Taxing Master by his certificate, dated the 16th of February, 1889, stated that, in pursuance of the order of the 31st of July, 1888, "I have taxed and settled the bill of fees and disbursements thereby directed to be taxed and settled at the sum of £204 11*s.* 9*d.*" And, allowing for sums of money received by the Defendant of or on account of the Plaintiff, and payments made by him to or on account of the Plaintiff, and the costs of the reference, which were to be paid by the Defendant, the Master certified that a sum of £25 18*s.* 2*d.* remained due from the Defendant to the Plaintiff.

The Defendant then took out the present summons to review the taxation. The summons was heard before Mr. Justice *North* on the 18th of May, 1889.

Swinfen Eady, for the Defendant:—

The order for taxation directed the Master to tax all the Defendant's costs, and the Master by his certificate says that he has done so, and that the sum which he mentions is due from the Defendant to the Plaintiff. After this certificate it would be very difficult for the Defendant to set up a lien on documents of the Plaintiff in his possession in respect of other costs which the Master has not taxed. A solicitor's lien on his client's documents remains in respect of statute-barred costs. Those costs are not the less a debt because an action cannot be maintained for them. When the solicitor has a lien upon documents of the client the Master ought to tax items which are statute-barred. If the Plaintiff were to apply for an order for the delivery up of his documents, the Defendant would have no answer to the application so long as the Master's certificate stands as it is. The Master ought either to have taxed those items, or he ought to have certified the facts specially.

[NORTH, J.:—If I dismiss your summons I might do so without prejudice to your lien for the costs which are statute-barred.]

That would remove a great part of the difficulty.

[*Cozens-Hardy*, Q.C., for the Plaintiff:—I should not object to that.]

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The other point is, that there has been, by the letter of the 26th of June, written by *Paisley & Falcon* to the Defendant, a sufficient acknowledgment of the items which are said to be statute-barred to take the case out of the statute. An acknowledgment of the existence of a debt is sufficient for that purpose; from it a promise to pay the debt must be implied; *Quincey* v. *Sharpe* (1); *Skeet* v. *Lindsay* (2); *Tanner* v. *Smart* (3); *Banner* v. *Berridge* (4). The written authority given by the Plaintiff to *Paisley & Falcon* empowered them to make this acknowledgment on his behalf.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the Plaintiff:—

The letter relied upon was not written by the Plaintiff himself, but by his solicitors, and they had no authority to promise to pay a statute-barred debt. The extent of their authority had been communicated to the Defendant. An application for the taxation of a solicitor's bill has never yet been held to amount to an undertaking to pay statute-barred items. A request for an account can have no greater effect. That which is necessary to constitute an acknowledgment sufficient to exclude the operation of the statute is shewn by *Mitchell's Claim* (5) and *Green* v. *Humphreys* (6). In order that a promise to pay a statute-barred debt may be implied there must be an absolute unconditional acknowledgment of the debt. There is no such acknowledgment here. The common order obtained by a client for the taxation of a solicitor's bill is founded on the submission of the client to pay what is due, and yet under such an order the Master would not tax statute-barred items.

Swinfen Eady, in reply:—

The Plaintiff's solicitors had authority to make the acknowledgment. *Green* v. *Humphreys* is not inconsistent with the other cases. Here the surrounding circumstances are in favour of an intention to pay everything that was due to the solicitor; the object was to get all the Plaintiff's papers back. The effect

(1) 1 Ex. D. 72.
(2) 2 Ex. D. 314.
(3) 6 B. & C. 603.
(4) 18 Ch. D. 254.
(5) Law Rep. 6 Ch. 822.
(6) 26 Ch. D. 474.

of the submission contained in the common order for taxation is well settled by practice, and it does not assist the present argument.

NORTH, J.:—

I do not see my way to distinguish the present case from those on which Mr. *Eady* has relied, and therefore I think the letter of the 26th of June is sufficient to take the case out of the statute. Suppose the letter had been written by the client, then, in order that it might have that effect, it must come within the rule laid down by Lord Justice *Mellish* in *Mitchell's Claim* (1). He said (2): "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." The question is, whether there has been an admission of a debt from which a promise to pay it is to be implied. There had been certain transactions between the Plaintiff and the Defendant, and then the relation between them of solicitor and client was terminated by the Plaintiff, and he gave Messrs. *Paisley & Falcon*, his new solicitors, an authority in writing. [His Lordship read the written authority, and continued:—] The new solicitors entered into correspondence with the Defendant, and they wished to have the Plaintiff's deeds and documents given up by the Defendant, and their first object was to have them delivered up at once. Then the Defendant wrote the letter of the 26th of June, in which he asks whether the Plaintiff "requires my bill of costs from the date when I became his sole agent, or how otherwise?" That, I think, means, "from what other date, or what other bills." Then the same day *Paisley & Falcon* reply, "our client only requires you to deliver particulars of any unsettled bill of costs you may have against him." That is a request for particulars of unsettled bills of costs, and I can see nothing to indicate that the request is limited to bills since the last account was sent in. I do not think that is the meaning. I

(1) Law Rep. 6 Ch. 822. (2) Law Rep. 6 Ch. 828.

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think it means all bills of costs which are unsettled, and, in my opinion, on the authority of the cases which have been referred to, this letter, if it had been written by the Plaintiff himself, would have prevented him (not indeed from having the bills taxed) but from setting up the *Statute of Limitations* as a bar.

And, in my opinion, it makes no difference that the acknowledgment was made by the solicitors, not by the client. They had authority from him to settle whatever claim the Defendant might have upon the deeds. They were authorized to ask for whatever account was necessary to shew what the amount of the Defendant's lien was. They had authority from their client to make the acknowledgment, and I cannot, therefore, distinguish the case from those which Mr. *Eady* cited. I can see no discrepancy between those cases and *Green* v. *Humphreys* (1). The language used by Lord Justice *Cotton* in *Green* v. *Humphreys* is a little different, but I think he adopts the earlier cases. In my opinion, therefore, there has been such an acknowledgment of the items in question as prevents the Plaintiff from setting up the statute, and the Taxing Master ought to have taxed those items.

I should not like to decide without further consideration the question whether, under the common order for taxation, the Taxing Master would properly disallow, without taxing them, all statute-barred items. The question does not really arise here, for it is clear that the parties intended there should be a taxation for the purpose of determining what the amount of the solicitor's lien was.

W. L. C.

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The Plaintiff appealed from this decision. The appeal was heard on the 9th of August, 1889.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the appeal:—

[The arguments on the question whether there was any acknowledgment taking the old items out of the *Statute of Limitations* are omitted, as the Court pronounced no opinion on the point.]

It is urged by the Defendant that he has a lien which ought

(1) 26 Ch. D. 474.

not to be prejudiced. But the order does not contain the usual direction for delivery of documents on payment. The Defendant's lien is not interfered with.

[COTTON, L.J. :—Your summons asks for delivery of documents. Is not the object of the order of the 31st of July to ascertain the amount for which the Defendant has a lien ?]

If there is anything in the order to prejudice the Defendant's lien the Plaintiff is willing to have it made without prejudice to the lien. The common order for taxation of a solicitor's bill is founded on the submission of the client to pay what is due, but under it the Taxing Master would not tax items barred by the statute. How can an order be made for payment by the client personally of a statute-barred debt, in the absence of an acknowledgment to take it out of the statute? The balance "due" must mean the balance for which the client could be sued.

Romer, Q.C., and *Swinfen Eady*, for the Defendant :—

The object of the proceeding here was to get the documents, and for that purpose to ascertain the amount of the lien upon them. The order of the 31st of July settles the whole matter, it directs delivery of "a bill," that is one single bill, of the Defendant's fees and disbursements in all matters in which he has acted as the Plaintiff's solicitor, and it directs taxation of "the said bill." The Taxing Master ought therefore to have taxed the whole bill, and that he has not done. The order gives the Plaintiff leave to pay into Court £350, that he may get the documents at once. This shews that the order is dealing with the solicitor's lien. It is urged that the balance "due" only means the balance that can be sued for, but there is no ground for this; a debt barred by the statute is not extinguished—it is still due, though no action can be brought for it. The common form of an order to tax a solicitor's bill is found in *Seton* on Decrees (1), and if the Plaintiff's contention is correct it destroys a solicitor's lien for costs against which the statute has run, for it directs delivery of documents on payment of what is certified to be due. This cannot be intended. If the present certifi-

(1) 4th Ed. vol. i. p. 604.

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cate stands the Defendant's lien on the documents for statute-barred costs is gone.

Cozens-Hardy, in reply:—

There can be no personal order against the client to pay a statute-barred debt, as he has given no undertaking to pay. "Due," therefore, must mean exigible.

[FRY, L.J.:—You have submitted to an order directing you to pay.]

COTTON, L.J.:—

The question before us arises, not on an order for taxation made upon the usual petition of course, but on an order made upon a special application for delivery and taxation of the Defendant's bills of costs, and for delivery up of the Plaintiff's deeds and documents. Upon this application an order was made that the Defendant should deliver to the Plaintiff a bill of his fees and disbursements in all suits, causes, and other matters in which he had been employed as the attorney or solicitor of the Plaintiff, that the bill should be taxed, and that the Taxing Master should certify the amount due from the Plaintiff to the Defendant or from the Defendant to the Plaintiff, and payment of the amount so certified was ordered. Liberty was given to the Plaintiff to pay into Court £350, and, if he did so, his deeds and documents were to be handed over to him, it being provided that the £350 should be subject to the same lien as the deeds and documents. In my opinion this was a most extraordinary way of obtaining taxation, if taxation was the only object. It is clear that the Plaintiff's object in these proceedings was to get possession of his deeds, and that the object of the taxation was to ascertain the amount for which the Defendant had a lien on them. I think the Taxing Master did not act in obedience to the order when he declined to tax certain items on the ground that they were barred by the *Statute of Limitations*. But how, it is said, could the Taxing Master certify a sum to be due which was barred by the statute? In this particular order I think that "due" included everything that was owing, whether barred by the statute or not. Statute-barred debts are due, though payment of them

cannot be enforced by action. Then it is said how can the Plaintiff, who gave no undertaking to pay, be ordered to pay a balance including debts barred by the statute? The answer is that he has submitted to an order directing him to pay. I cannot differ from the order of Mr. Justice *North*, though I do not support it precisely on the same grounds. I give no opinion whether the Defendant has a right of action for the disputed items; I go on the ground that the scope of the order is to ascertain the amount of costs for which the Defendant has a lien.

FRY, L.J.:—

I am of the same opinion. The Plaintiff chose to depart from the ordinary practice, and on a special application he obtained an order in an unusual form. It orders the delivery of "a bill" of costs in all matters of business in which the Defendant has been employed as attorney or solicitor of the Plaintiff, and there is a reference to the Taxing Master to tax and settle that one bill, and he is directed to certify the amount due. There is to be one certificate only on the one bill of costs, which must include all matters of business running over the years during which the Defendant had been employed by the Plaintiff. Liberty is given to the Plaintiff to pay into Court £350, and, if he does so, the Plaintiff's deeds are to be delivered up. To support the Plaintiff's case the order ought to have directed two certificates, one of the amount for which the Plaintiff was personally liable, and the other of the amount for which he was not personally liable, but for which the Defendant had a lien. I think that it is too late now for the Plaintiff to make a distinction between the two amounts.

LOPES, L.J.:—

I am of the same opinion.

Solicitors for Defendant: *Wood & Wootton.*
Solicitors for Plaintiff: *Speechly & Co.*

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Feb. 8, 9, 11, 12, 25, 26, 27; *March* 1, 13.
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[1887 G. 1636.]

Company—Prospectus—Fraud—Action of Deceit.

R., the principal partner in a trading firm, concurred in steps for turning the partnership into a company with limited liability. His name appeared in the prospectus as managing director of the new company with a note that he would not join the board till after the transfer of the business to the company had been completed. He did not issue the prospectus but furnished materials for it, saw it in draft though not in its final shape, and made alterations in it. The prospectus contained a statement that the business had paid 17 per cent. upon the capital employed in it. This statement it appeared might be true if "capital employed" did not include the business premises, or only included their value subject to mortgages upon them, but was grossly untrue if the whole value of the business premises was taken as part of the capital. A person who took shares on the faith of the prospectus sued *R.* for damages for misrepresentation:—

Held, by *Kekewich*, J., that *R.* was under the circumstances liable to the same extent as if he had been the person issuing the prospectus:—

Held, also, by *Kekewich*, J., that the statement as to 17 per cent. was untrue and made recklessly without any reasonable ground for believing it to be true, and that *R.* was liable to damages for misrepresentation, following *Peek* v. *Derry* (1). After this the decision in *Peek* v. *Derry* was reversed by the House of Lords:—

Held, on appeal, that, according to the law as laid down by the House of Lords in *Peek* v. *Derry* (2), in order to make a person liable for damages for misrepresentation it is not enough that the statement should be untrue and made without any reasonable ground for believing it to be true, but it must be made dishonestly; that the onus of proving dishonesty lies on the plaintiff; that if the party making the statement believed, however unreasonably, that it was true, he is not liable; that the plaintiff in the present case had not shewn that the statement was made dishonestly, and that the judgment must be reversed and the action dismissed.

GEORGE ROLLS and *Richard Everett Rolls* carried on business in partnership as floor-cloth and linoleum manufacturers. In November, 1879, *R. E. Rolls* died. *George Rolls* thereupon became the owner of the whole business on paying to the representatives of *R. E. Rolls* £2869 18*s.*, the sum standing to the credit of the deceased partner in the capital account, and taking

(1) 37 Ch. D. 541. (2) 14 App. Cas. 337.

on himself the liabilities of the business. The following is an abstract of the account then made out:—

CAPITAL ASSETS.

	£	s.	d.
Buildings valued at	11,000	0	0
Plant and machinery	3057	17	10
Cash at bank	208	7	1
Debts owing to firm	388	9	6
Stock in hand	7157	0	8
	£21,811	15	1

HOW PAID FOR.

		£	s.	d.	£	s.	d.
1879. Dec. 31.	Capital credited to G. Rolls in books of old firm	2869	18	0			
	Credited to him in cash a/c	1022	7	9			
					3892	5	9
	To executors of retiring partner				2869	18	0
	Liabilities taken over				15,049	11	4
					£21,811	15	1

In 1885 *George Rolls* took his two sons into partnership under articles dated the 9th of October, 1885. The business premises remained the property of *George Rolls*, the partnership occupying them at a yearly rent of £680. The articles provided that the capital of the firm should consist of the trade fixtures, plant, and machinery employed in the business, and the goodwill, stock-in-trade and book debts, all which particulars were taken as worth £16,917 18*s.* 9*d.*, and of £1000 brought in by the two sons in equal shares. *George Rolls* was to be credited with the yearly sum of £814 as interest on the £16,917 18*s.* 9*d.*, but the £1000 brought in by the sons was not to bear interest. If any of the partners brought in any further capital, the sum brought in was to bear interest at £4 per cent.

On the 1st of April, 1886, an agreement was entered into between the partners and the *Universal Contract Corporation, Limited*, that the partners should sell to the corporation the business premises, plant, machinery, stock-in-trade, and goodwill for £38,360, to be satisfied by payment of £33,360 in cash, and by the transfer to the vendors of 1000 fully paid-up £5 shares in a company to be formed. If the purchase was not completed by the 1st of June then next, the agreement was to be void.

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A limited company was accordingly formed, with a nominal capital of £80,000, in 16,000 £5 shares, and an agreement was entered into for the sale by the *Universal Contract Corporation* to the new company of the assets for £51,360, of which £26,665 was to be taken in fully paid-up shares. A prospectus was issued, offering the remaining shares to the public. This prospectus gave the names of the five directors, *G. Rolls* being chairman, and his two sons managing directors, a note being added that they would join the board on the completion of the purchase.

The prospectus contained the following clause—

"The annual sales are already very large and the business at the present time returns a net profit of over 17 per cent. on the capital employed."

On the back of the prospectus was a heading, "Present annual net profit 17 per cent."

Along with the prospectus was issued a circular by the secretary which stated that "the business has been established and carried on with great success for the past ninety-four years. The annual net profits are equal to 17 per cent. on the capital employed in the business."

The prospectus was not prepared or issued by *George Rolls*, but the draft of it was submitted to him. As originally prepared it stated that the present returns shewed "a profit of over 20 per cent. on the capital employed in the business." He objected to this and it was modified. He was not shewn to have been privy to the circular. There was difficulty in ascertaining what the profits really had been, no proper balance sheet of the business having been made for some years. The premises in which the business was carried on were in 1879 subject to a mortgage for £8900 to the bankers of the firm, which sum was included in the liabilities taken over by *George Rolls*.

George Rolls on cross-examination said that he did not consider the business premises as part of the capital employed in the business. If they were excluded the capital in 1879 might be considered as being £10,811 15*s.* 1*d.*, which in 1885 was increased to £11,811 15*s.* 1*d.* by the capital brought in by the two sons. In the meantime the sum of £5700 had been expended

in plant and in improving the buildings. A report made by a firm of accountants as to the profits shewed an amount which if the "capital employed" was taken at £14,000 or less would amount to about 17 per cent., but if the buildings were to be included as part of the capital the profits were nothing approaching to that rate.

The Plaintiff took and paid up in full 200 shares in the company in reliance on the above statement in the prospectus. He brought this action against the limited company and *George Rolls*, but the action was discontinued as against the company. By his statement of claim he alleged that the prospectus containing the representations as to 17 per cent. was issued by *George Rolls*, that the statement was false, and that *George Rolls* knew it to be so at the time when it was made, and he claimed a declaration that he was induced to take the 200 shares by the fraudulent misrepresentations of *George Rolls*, and damages for the loss occasioned to the Plaintiff by the fraudulent misrepresentations.

The action came on for hearing before Mr. Justice *Kekewich* on the 8th of February, 1889.

After evidence had been given of the formation of the company, and of the circumstances attending the preparation and issue of the prospectus, the liability of the Defendant *George Rolls* for the statement in the prospectus as to the net profits of the business, assuming it to be false, was first argued.

Warmington, Q.C., and *J. M. Solomon*, for the Plaintiff:—

This is simply an action for deceit. The Defendant was the promoter of the company in the fullest sense of the word from the outset. He was the principal partner in the concern, and must have furnished the information on which the prospectus was drafted, and his name appears prominently in it. Although he did not see the prospectus until after it was issued, he never repudiated it, and therefore must be taken to have authorized and adopted it, and is liable for the misstatements in it: *Peek* v. *Gurney* (1); *Peek* v. *Derry* (2); *Weir* v. *Bell* (3). The *Universal Contract Corporation* were mere intermediaries. The Defendant

(1) Law Rep. 6 H. L. 377. (2) 37 Ch. D. 541.
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was the real vendor. We rely on the words, "the annual net profits are equal to 17 per cent. on the capital employed in the business."

Moulton, Q.C., and *Muir Mackenzie*, for the Defendant:—

The authorities cited are distinguishable. In all of them the defendant was a party to or responsible for the prospectus before its issue. Here the Defendant never saw the prospectus until after it was issued, and after the Plaintiff had applied for his shares. The sale to the *Universal Contract Corporation* was a *bonâ fide* transaction, and they were in no sense the agents of the Defendant, and he did not become a director of *Rolls & Sons, Limited*, until after the purchase by that company was completed.

KEKEWICH, J.:—

It is difficult to overrate the importance of the question which I am called upon to decide. The enormous extent of joint-stock enterprise during the last two or three decades, and its enlargement in a particular direction, of more recent years, make it of the first importance that the law should be precise and understood as far as possible by all, especially by those engaged in commercial undertakings. The point which I am now asked to decide arises here in its present form for the first time. It is sought to make *George Rolls*, the Defendant in this action, liable for a statement in the prospectus issued by this company of Messrs. *George Rolls & Sons, Limited*. For the purpose of this present point, I must assume that the statement about a profit having been earned of 17 per cent. upon the capital employed was a statement unauthorized by the facts. It has already been proved that the Plaintiff relied upon it, and I have nothing to assume as regards that; but I must assume that the statement itself was untrue, that is, was a misrepresentation which, if made by the Defendant, would give the Plaintiff a right to relief in an action of this kind—namely, an action of deceit. I have had it proved that this particular prospectus, the actual document issued by the company, which was actually printed off and distributed, was not seen by the Defendant. He did see earlier drafts, earlier proofs of a prospectus, but he did

not see this particular one; and with that fact really all the facts which I have to deal with on this particular point as to his share in the actual prospectus are concluded. Therefore, if it were necessary to prove, as against the Defendant in an action of deceit, that he himself was a party to the issue of the prospectus in the sense that he saw the papers, or one of the papers, issued, or the copy sent to the printers, or, in some other way, the very thing that reached the complaining party's hands, the Defendant would be entitled to judgment in this case. The question is, Is that the limit of his liability? I have before me two or three cases which, I think, completely guide me to a conclusion upon this question and upon the principle which should be applied to it. I find Lord *Bramwell*, who was then a member of the Court of Appeal, in *Weir* v. *Bell*, saying this (1): "I think that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract." Taking that as my guide, I have to inquire whether, in any way, Mr. *George Rolls* was a principal in the contract between the company and the Plaintiff so as to be liable for the act of his agent—that is to say, liable for the act of those who issued the prospectus, on the ground that they were his agents committing the fraud. Now, in order to solve that question, I must go back and consider the circumstances. Mr. *Rolls* was not merely one of the partners in the firm of *Rolls & Sons*, but he was the principal partner, the man who had the larger portion of the capital, and a man of experience, and more than that he was the father of the two other partners in the concern, and he, therefore, knew more about the concern than any other person. Under these circumstances, an arrangement is made for what is called converting this partnership business into a limited company; and that is done in this particular instance by means of a so-called sale to a company called the *Universal Contract Corporation, Limited.* I say "so-called sale," because I do not hesitate to say that it is not, in any proper sense of the word, a sale. It is true that *George Rolls* and his partners are called "the vendors"; that the

(1) 3 Ex. D. 245.

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Universal Contract Corporation are called "the purchasers": and that the contract takes the form of a sale and purchase at a particular price; and it is also true, as pointed out by Mr. *Moulton*, that the price to be paid by the *Universal Contract Corporation* is not the price which is to be paid by the company purchasing from them. But, nevertheless, I certainly consider this contract of the 1st of April, 1886, as something quite different from an honest purchase and sale. I look upon it as mere machinery for the employment of the *Universal Contract Corporation* to act as the agents of Messrs. *Rolls* in floating this company. But even supposing you put it higher than that—supposing it were a sale for contract and purchase, and is to be so regarded in the strict legal sense of the word, even then nothing was possible without Mr. *George Rolls*' active concurrence; and in order to enable these purchasers to float their company, he advertises it, and he gives that information to possible investors which possible investors would require. Mr. *George Rolls* must have furnished that information, and must have assisted the purchasers to look into the books of the company for the purpose of extracting the particulars which were necessary. It was impossible for the matter to proceed without his concurrence; and if one looks into the prospectus, you find references there made to the firm which would lead any person reading the prospectus through to come to that conclusion. That being so, Mr. *Rolls* stipulated, and wisely stipulated, for seeing the draft prospectus, and that is conceded to him, and he sees draft No. 1 and draft No. 2. There his inspection apparently commenced and ended. There must have been more drafts. One cannot jump—at least, I cannot—from draft No. 1 to draft No. 2, nor can one jump from draft No. 2 to the finally-approved issued prospectus. But when he had seen and finally approved of draft No. 2, he was content to leave the matter in the hands of those whose immediate business it was to issue the prospectus. But he took a peculiar position. I have no contract to that effect before me, but it is stated in the prospectus, and it is part of the case, that an arrangement was made by which Mr. *George Rolls* and his sons were to become the directors of the company; and in order to avoid any question whether the contract was approved by them as directors, when

they were themselves the vendors, recourse was had to a device which has been common of late years (and is a device which, when adopted in this way, may as well be given up as soon as possible), of stating that these three gentlemen, who necessarily had a large interest in the matter, would join the board on completion of the purchase. Though I have not heard it from Mr. *Moulton,* I suppose it would be gravely suggested that by that asterisk and that note their liability as promoters was avoided. To my mind their liability is in no way avoided, except that, until the proper time arrived when they took their seats on the board, they would not be liable as directors. But that they would be liable as promoters from first to last I cannot for a moment doubt. Mr. *Rolls* seems to me to have been the principal promoter of this concern. He was, as I have said, the principal partner; he is a party to the agreement; he insists upon seeing the prospectus; he was to take a large share of the purchase-money, which could only be reached by the successful floating of this company, and I have no doubt whatever that he is properly described as one of the promoters. Possibly he might be called the first promoter of this company. That being so, everything must have been done by those whom he employed as his agents, and persons acting on his behalf. Then I find in *Peek* v. *Derry* (1), *Peek* v. *Gurney* (2), and *Weir* v. *Bell* (3), in all these three cases, statements going to shew that it is not necessary for a promoter to be an actual party to the issue of the actual prospectus, but that he is bound to make inquiries—he is bound to protect himself by seeing that the truth is told; and if the truth is not told, he is liable for it. I will not read again the passages which have been read in the course of the argument. There is the passage in Lord Justice *Cotton's* judgment in *Peek* v. *Derry*; there is a passage of Lord *Chelmsford's* judgment in *Peek* v. *Gurney* respecting the position of Lord *Berkeley,* and there is the extremely valuable comment upon that of Lord Justice *Cotton* in the case I have already mentioned, of *Weir* v. *Bell.* But it is said that Mr. *Rolls* did not know of the issue of this prospectus until after the Plaintiff had applied for his shares. If in Mr.

(1) 37 Ch. D. 541. (2) Law Rep. 6 H. L. 377.
(3) 3 Ex. D. 238.]

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Rolls' conduct afterwards anything that he said or did was relied upon as of itself being the occasion and ground for an action of deceit, I should certainly hesitate to decide the point as I am now proposing to decide it. There are passages in Lord Justice *Cotton's* judgment in *Peek* v. *Derry* (1) suggesting the notion that a prospectus containing a misrepresentation may be adopted by a person not originally liable for it, so as to give a right of action. But I do not think that that is the proper interpretation of the Lord Justice's language. I need say no more, because, to my mind, what the Lord Justice says, and what is to be found in other cases, does go reasonably and properly to this, that when you find a man occupying such a position as Mr. *Rolls* occupied here, having the matter brought to his attention later, taking advantage of the prospectus, taking the money or shares which were got by means of that prospectus, and yet never repudiating it, never for one moment saying, "Why I find here there is a statement which is untrue, and which ought not to have been made, and which, as an honest man, I must at once withdraw," it is strong evidence to shew that originally the statement was made with his authority. Therefore I come to the conclusion that there is enough here to make Mr. *Rolls* liable, and the only question which I have now to try is whether the prospectus does contain what, I have thus far been obliged to assume that it contains, a misrepresentation of fact.

H. L. F.

The examination of the accounts of the business, and the examination and cross-examination of witnesses, and the arguments on the issues of fact, were then proceeded with on the 11th, 12th, 25th, 26th, 27th of February, and the 1st of March, and judgment was reserved.

March 13. The following written judgment was delivered:—

KEKEWICH, J.:—

It remains now to decide whether the representation in the prospectus alleged to be false and to have misled the Plaintiff is false, and if it be false whether it must be considered to have misled the Plaintiff to his injury.

(1) 37 Ch. D. 541.

The representation is that concerning net profits, to which I will call more particular attention presently. I cannot doubt on the evidence, that it was inserted without sufficient justification, that is, recklessly. It has, I think, been abundantly proved that no one responsible for the prospectus had the means of honestly stating as a fact that the business was then returning a net profit of 17 per cent. on the capital employed, and this whether the construction of that phrase urged by the Plaintiff or that urged by the Defendant is the right one. No one knew and no one, so far as I can see, had taken pains to ascertain what the net profits really were, and therefore no one calculated the rate per cent. as regards any amount of capital stated or estimated on any basis.

This, of course, does not conclude the question, because it may turn out that the representation though recklessly made, was, in fact true, and if that be so, the Plaintiff has no reason to complain. I must therefore inquire what was stated and apply the result to the facts and figures before me. The first step in the inquiry is to construe the language in which the representation is conveyed.

I have before me three statements, first, that on the back of the prospectus, " present annual net profits, 17 per cent.;" secondly, that in the body of the prospectus, p. 3, " the business returns a net profit of over 17 per cent. on the capital employed;" and, thirdly, that in the circular purporting to be annexed to the prospectus, " the annual net profits are equal to 17 per cent. on the capital employed in the business." It was admitted by Mr. *Warmington* that he had not brought home the circular to the Plaintiff, and that therefore it cannot be relied on as part of the representation on which he acted. Even if not sent to the Plaintiff, it was issued with the prospectus by the persons who framed it, and I might therefore properly refer to the circular as a contemporaneous explanation of the language of the prospectus, but there is no occasion to do this. The circular does not in substance differ from that language, and may be disregarded without fear of loss of assistance. Again, although the statement on the back of the prospectus emphasises that within, and indicates what importance was attributed and was intended to be

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attributed to the latter, and is therefore not to be forgotten, it contains nothing which otherwise assists the construction and, subject to the above remarks, may safely be laid aside.

Turning then to the statement in the body of the prospectus, and remembering that it must be construed in detail, one is tempted first to inquire what is meant by the opening words of the sentence, and to arrive at a conclusion what is "the present time" and what is to be understood by the statement that the business at the present time returns a net profit of over 17 per cent. On reflection I do not consider this to be the convenient or logical course. The expression "the capital employed" not merely raises the main question in the action, but is the governing phrase in the sentence, and must be construed before one can proceed further. It must be construed as any other words in any other instrument with reference to—1. The subject matter and 2. The context. The construction is for the Court and evidence of meaning is not admissible. Accountants are useful to arrange figures and deduce and explain results, and in this sense Mr. *Chandler* as well as others has been useful here. But it is not within his province to tell the Court what the expression "capital employed" means, or what any other word means. Mercantile law is part of the common law, and as such is known to the Court, which, with the assistance of counsel, reference to decided cases and accepted authorities, must apply it to the matter in hand. If there is a term of art or a usage requiring to be explained or established that may be done by those qualified to speak, but even if a question concerning mercantile use of the English language fell within this exception, the only evidence admissible would be that of merchants, bankers, or others of that class, and the evidence of accountants would still be excluded. There is no term of art here—no usage. There can be no question about the ordinary meaning of the word "capital." The question is what is to be understood by the expression in this particular document "capital employed."

These are elementary remarks scarcely worth introduction into a case of such importance as this, but they have been rendered necessary by the repeated attempts of the Defendant's counsel to import evidence clearly inadmissible.

For many purposes, that is with reference to a different subject-matter, or in connection with a different context, the expression "capital employed" might mean something quite different from what I take it to mean here, but, notwithstanding some difficulties which occur in the application to particular facts, I have no doubt what idea the expression as here used reasonably conveys, and must be taken to have been intended to convey, to the mind of an intelligent reader of this prospectus considering whether he should invest his money in *Rolls & Sons, Limited.*

The object of the prospectus is to tell the reader and possible investor what advantage he may expect to receive from an investment, and a valuable part of the information is that which deals with past experience of the business to be taken over by the limited company. The large and increasing orders rendering necessary an increase of capital (not, be it observed, replacement of capital sunk or lost) are mentioned, so are the extensive and extendible buildings and machinery, their value and that of the goodwill, and then comes the answer to the question which the reader naturally asks. What have the proprietors of this business made out of it? And in substance it is this: "We will not tell you the amount of capital employed, though from the statements made above, and the valuation, you may conclude it to be large; but this we tell you, that it has of late earned, or is now earning, 17 per cent. per annum, and of course we hope to improve on that."

It might be said that in any event the capital could not be less than the sum mentioned in the valuation, but though this would be a tempting and easy conclusion for an unwary reader, it would not be a true one. The present value cannot, to my mind, be in any way a test of the capital employed.

Nor is any guide to be found in the statements concerning the contracts entered into by the company. The unwary reader might be deceived by these also, but slight reflection would tell him that the purchase-money included the goodwill mentioned in the valuation, and the goodwill as valued to and paid for by the company could not be treated as capital employed.

What is a business worth is not the same as what is the capital employed, nor is: What is your capital, or what do you consider

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your capital to be? All these questions might be more or less precisely answered without giving that information which this prospectus purports to give.

The answer to any of these questions might in one case be a large sum, because by good luck and good management a trifling original expenditure had produced great results; in another, a small sum, because by bad luck or bad management a large original expenditure had produced nothing. Interest calculated at a particular rate on the present value would in the first case be far smaller, and in the second case far larger than it ought to be if intended to represent the earnings of the original capital.

Say to a man: You invested many years ago in such and such shares. What do they pay you? or which is the same thing, what interest does your investment, your capital employed, yield? He will answer according to the rate on what he invested—not according to that on the present value, which may be more or less.

Take this illustration: When it was sought to wind up the *European Assurance Society*, and their balance sheet was investigated, Lord Justice, then Vice-Chancellor, *James* loudly condemned the practice of including among the assets the price paid for the business of absorbed companies. That price represented money expended in the purchase of assets which, so far as they were capable of valuation, would be properly included, and it could no more be treated as an asset than money expended on machinery or tools. But would it have been possible to say that these sums were not invested or employed in the business? I trow not.

Take yet another illustration, hypothetical but an example of what has often occurred: A man is minded to embark in business and has £2000 at command; he invests £1000 in the purchase of a house, fittings, stock in trade, &c., and spends the other £1000 in advertising his business. At the end of the year his balance sheet shews his capital to be £1000 represented by the house, fittings, &c., and he has made a net profit of say £100. Has the business returned 5 or 10 per cent. on the capital employed? Can there be any doubt what is the proper answer?

In the course of the argument I stated for the convenience of

counsel what then seemed to me to be the meaning in such a prospectus as this of capital employed in a business. The definition then given was tentative, and expressed in language not sufficiently accurate and capable of misconstruction. In substance I still think it right, but the following better expresses my mature conclusion.

To my mind, in such a case as this, the capital employed in a business is the amount in £ *s. d.* which the person carrying on the business has invested therein, and which if not so invested might be in his pocket or otherwise expended on his account. It may have been wholly or partially lost, so that the business, if realized as a going concern, would not produce sufficient to replace it, or it may have fructified so that under like circumstances it would be replaced with usury. But however that may be it is what was invested or employed in the business, and it is properly spoken of as invested or employed for the purpose of determining at what rate per cent. on capital the profits earned by the business ought to be calculated. How the money was invested so long as it was put into the business is immaterial. It may be the price of land or buildings, a liability accepted and discharged, or money expended on machinery or any of the numerous requirements of a commercial business. And what matters it how this money is procured? It may be a gift, a loan, a sum entrusted. It may arise from realization of other investments, or from the forbearance to spend income. Whatever its source it is equally money invested or employed in the business, equally the mother of profits. On the other hand, money withdrawn from the business ceases to be capital employed as from the date of withdrawal, so that in order to ascertain what is capital employed at a given time one must add to the original capital any sums subsequently brought in and deduct the withdrawals.

Starting from this basis, about the soundness of which I entertain no doubt, I am at once confronted with the real difficulty of the case. It is extremely difficult to ascertain what capital was from time to time brought into or invested in the business and not having been withdrawn must be considered for the purposes of the prospectus as employed therein at the date to which the prospectus refers, say the 1st of January, 1886, from which time

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the company took over the business. At that date the Defendant *George Rolls* and his two sons were the partners in the concern, and between them owned everything employed therein which could properly be called capital. The two sons had between them brought in £1000. They had been admitted partners in 1885 in terms set forth in articles of partnership of the 9th of October, 1885. If what then occurred could properly have been treated as a sale by *George Rolls* to the new partnership, it might have been possible to regard the capital employed at the end of that year as equivalent to the price paid by the new partnership, but that was not the substance of the transaction. It was merely the admission by the father of his two sons, and one cannot regard his capital as otherwise than arbitrarily fixed. I must therefore inquire what sums were from time to time brought in by Mr. *George Rolls* and the ascertained amount, plus the sons' £1000 and minus any amount withdrawn, will give the capital employed.

There is no occasion to go back to Mr. *George Rolls'* first connection with the business. He carried it on in partnership with his brother *Richard Everitt Rolls,* and on the death of that brother in November, 1879, an arrangement was made between his executors and Mr. *George Rolls,* whereby the latter acquired the entirety of the assets.

The deceased partner's share in the business was ascertained to be £2948 6*s.*, and in consideration of this sum, and of undertaking the partnership liabilities, the surviving partner acquired the business. This, apart from a bargain about goodwill, to which I will presently refer, is the short result of the articles of partnership between the two brothers, and a deed to which the executors and the surviving brother were parties, dated the 15th of July, 1880. The assets properly treated as capital thus acquired by Mr. *George Rolls* have been stated on behalf of the Plaintiff in an account admitted by the Defendant to be correct except as regards one important item, viz., buildings valued at £11,000. The other four items amount to £10,811 15*s.* 1*d.*, so that if the buildings are properly included, there being no question about their value, the total is £21,811 15*s.* 1*d.* On the other side of course one finds how the purchase-money, which

also of course comes to the same sum, is made up. It consists of different amounts payable by the firm, and, therefore, henceforth payable by Mr. *George Rolls* as purchaser, and these include the ascertained capital payable to the executors and also an amount due to Mr. *George Rolls* himself, who must for this purpose be treated as a stranger. It further includes divers sums which had been lent by friends or invested through the partners in the firm, and £8900 due to the *London and Westminster Bank* on a mortgage on the buildings.

There is no occasion to say more than I have done in passing about the other items, but the buildings and the mortgage thereon require special mention because it has been urgently contended that they ought not, at least in that manner, to enter into the account.

It is said that if the buildings, meaning the land with buildings erected thereon, are brought in as capital employed at all they ought only to be brought in at the difference between their value and the amount of the mortgage thereon, viz., £2100. I am wholly unable to appreciate this position. The land on which the buildings were erected was purchased by the partnership for partnership purposes—buildings were erected thereon at the cost of the partnership—they were in use in 1879, and they were thenceforward used for the business of the partnership. For partnership purposes they were valued on the sale and purchase in 1879 at £11,000, and I fail to understand why they ought to be taken at any less sum. What matters it that the bank were creditors of the partnership for £8900, and that their debt was secured on these buildings. You might, it seems to me, as well say that the cash balance or any other asset ought not to be taken into account at its full value because the firm was in debt to, say, Mr. *Cresswell*. After a time the mortgage was paid off out of moneys not arising from the business. The logical result of the position which I am examining would be that the buildings then became employed to the full extent of their unincumbered value, but in truth the buildings, agreed to be worth £11,000, were employed in the business no more or less after than before the mortgage was discharged. Subsequently they were mortgaged again, and the money raised by that means or part thereof

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was invested in the business. This likewise cannot affect the question. The bringing in of capital thus raised increased the amount of capital employed, but could not make the buildings less employed or reduce the amount of which they were the equivalent.

Suppose a mechanic to borrow money for the purchase of valuable tools, and to give a bill of sale of those tools to secure the price. The capital employed by him in his business is the price of the tools, and it is no more or less so when by his earnings he has paid off the debt, notwithstanding that at one time he was insolvent, and he is now a free man; his financial position is entirely altered, but his capital employed remains the same. My conclusion, therefore, is that the capital employed as on the 1st of January, 1880, and thenceforward until any addition or diminution took place, must be taken to be £21,811 15*s.* 1*d.* It is possible that this may not be precisely accurate, but, having regard to all the circumstances, I think it must be taken as sufficiently so, and it is that under which the Defendant *George Rolls* claims.

[His Lordship then expressed his opinion that he could not add £2500, the price of goodwill payable. As to additions to and withdrawals of capital the evidence was unsatisfactory, but that before the 1st of January, 1885, by expenditure on buildings and plant, the capital had been raised to £27,511 15*s.* 1*d.* Nor was there evidence of any withdrawal, the fair inference being in the contrary direction.]

I find therefore that the capital employed in the business, which, on the 1st of January, 1880, was £21,811 15*s.* 1*d.*, was increased between that date and the 1st of January, 1885, in the manner already mentioned by £5700, and was further increased in 1885 by the two sums of £500 each brought in by the sons, so that in 1885 it was in all £28,511 15*s.* 1*d.*, and that, as there is no proof of any withdrawal before or in that year, it must be taken to have amounted to the last-mentioned sum on the 1st of January, 1886, as from which date the company took over the business.

It would require about £4760 to provide interest at 17 per cent. on this sum, and inasmuch as on no calculation for any

possible period the net profits of the business reached or approached this amount, the statement in the prospectus that "the business at the present time returns a net profit of over 17 per cent. on the capital employed" is on any construction of "the present time" untrue, and would remain untrue even if the total of capital employed were largely reduced. I might, therefore, avoid expressing any opinion on the construction of this sentence, but that would probably be inconvenient, and as I have necessarily considered the question my conclusion may as well be stated.

About "net profits" there is no difficulty. It is the sum divisible among the partners after discharging or making provision for every outgoing properly chargeable against the period, whether a year or less, for which the profits are calculated. There is no occasion to specify what outgoings are properly chargeable, for although the question sometimes occurs the principle of solution is easy and well understood. Ought a deduction to be made for depreciation? There are two good reasons for an affirmative answer. First, Profits must be deemed to be calculated as a prudent man of business would calculate them, that is, after making a fair allowance for depreciation. Secondly, Apart from mere prudential reasons an allowance is necessary, because with wasting property there is a constant consumption of capital and that ought not to enter into profits. The proper deduction is of course in each case a question of evidence. I was a little surprised at Mr. *Price's* definite opinion that 5 per cent. was sufficient here, because I have been accustomed to opinions in favour of higher rates, but he fully explained his opinion as applicable to the particular circumstances of the case and it is conclusive. He allowed no depreciation on tools and such other things as are destroyed by use within the year, and no doubt he is right. Depreciation is a deduction from the value of property still remaining in use, and is a term inapplicable to that which has gone whether replaced or not, but the replacement of what has been destroyed or lost would notwithstanding come into revenue account and be properly calculated in reduction of profits. I need not pursue this subject any further.

Net profits may of course be ascertained for any period, but in

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common parlance they are taken to mean annual net profits, and I think that they must be thus construed in a prospectus in the absence of language to indicate a different meaning. Here there is nothing of that kind, and indeed the language is all the other way. But for what periods have the net profits been according to the prospectus 17 per cent.? "At the present time" standing alone literally means now in May, 1886, when this prospectus is issued, but to construe the words thus would be folly only justified by the impossibility of any other construction. The investor is told to expect 20 per cent. on his money from when?—clearly from the 1st of January, 1886, from which time the business belongs to the company. I think that the present time must be taken to refer back to that date. But are the profits spoken of those of one year only or last year? I think so. I do not say that an average of two or more years would have been unfair, or that reference to a single year of exceptional trading not likely to be continued would have been fair, but, having regard to all the circumstances, I think the primary meaning is the profits of last year. The Plaintiff therefore has been deceived; the prospectus tells him that the business returns 17 per cent. net profit on the capital employed, and that is untrue. He was not asked (and I declined to allow him to be recalled for the purpose) in what sense he understood the particular words. According to *Smith* v. *Chadwick* (1) he cannot avail himself of any meaning of the words not being the only reasonable one unless he has sworn that to have been his belief at the time, but in my view the interpretation which I have placed on the language of the prospectus is the only reasonable one. I do not believe that it would occur to any reasonable man to think that elaborate accounts make capital employed vary according to value, a reasonable man of average intelligence would say, I am asked to put money into this concern and I am told what money hitherto put into it has earned. I am not sure that I should give credit to a man stating that he understood the language in any other sense.

That the Plaintiff has suffered damage there is no doubt. The evidence proves that he has invested in a concern which, whether successful or not, is not at all equal to what it was represented to

(1) 9 App. Cas. 187.

be. This is said to be due to exceptional loss from the failure of the company with which large sums were deposited; possibly, this accounts for unsuccessful trading. It may be that the damage attributable to the deceit will, on inquiry, turn out small, but there is evidence to justify the inquiry, and whatever damage is ascertained on the result of that inquiry the Defendant *George Rolls* must pay. I have held him liable, not because he framed the language of this particular prospectus, for he never saw it, nor because he must be taken to have issued it in the character of director, for he was not a director, but because he was a promoter of the company, and being party to the issue of a prospectus for his own benefit, and furnishing, as he alone could, the materials for it, he owed a duty to every person thereby invited to take shares which duty he failed to perform. If the decision in *Peek* v. *Derry* (1) is unsound, much that I have said in this and other cases is unsound also, but of course I take it to express settled law.

The form of judgment in such a case as this was well considered in *Arnison* v. *Smith* (2), and there framed on *Peek* v. *Derry*. I wish to adopt the same form here, and the judgment will be to this effect:—Order and adjudge that the Plaintiff do recover against the Defendant the amount of damages which shall be certified under the inquiry hereby directed in respect of deceit and misrepresentation contained in the prospectus in the pleadings mentioned, and also his costs of action up to and including the trial.—Direct an inquiry what damage the Plaintiff has sustained by reason of such deceit and misrepresentation having regard to the price paid by him for his shares in *J. Rolls & Sons, Limited*, and the value of those shares at the date of the allotment. Costs of inquiry reserved with liberty to apply.

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The Defendant appealed. The appeal came on for hearing on the 23rd of July, 1889.

Moulton, Q.C., and *Muir Mackenzie*, for the Appellant:—

The judgment appealed from was based on the decision in *Peek* v. *Derry*, but that decision has since been reversed by the

(1) 37 Ch. D. 541. (2) 41 Ch. D. 348.

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House of Lords (1). It is not necessary now to shew that the Defendant had good grounds for believing his statement to be true; it is sufficient that he did believe it, and made the statement *bonâ fide*. In the present case we go further, for we say that the statement was not untrue in the sense in which the Defendant made it. The prospectus, for which the Defendant has been held responsible, said that the annual profits were 17 per cent. on the capital. That was true if it referred to the capital actually employed in the business, and so the Defendant understood it. If all the capital which had been sunk was included it would not be true.

If the statement was not true, the Defendant believed it to be so. The evidence contradicts the notion that he made the statement recklessly; for he objected to the prospectus as first drawn up. *Rolls* did not know of his own knowledge what the rate of profit was; he put into the hands of accountants proper materials for ascertaining them; they reported 17 per cent., and he believed them. According to the principles laid down by the House of Lords, there must be *mala mens* to give a right of action. The onus of shewing that the statement was made fraudulently is on the Plaintiff, and he has not discharged himself from it.

Warmington, Q.C., and *J. M. Solomon*, for the Plaintiff:—

The prospectus must be looked at all through, and if it is taken as a whole, we say it is impossible that *Rolls* can have honestly believed the statements contained in it. If we deduct from the capital mentioned in the partnership deed of 1885 the value of the goodwill and add to it the value of the buildings and land, which for the present purpose must be treated as part of the capital, we have a capital of nearly £23,000, and there is no pretence for saying that the profit was anything like 17 per cent. on that. In *Arnison* v. *Smith* (2) the present Lord Chancellor expresses his approbation of what was said by Lord *Selborne* in *Smith* v. *Chadwick* (3) and in *Peek* v. *Derry* in the House of Lords (4) he refers to his judgment in *Arnison* v. *Smith*, and says that he abides by it. Now, according to that judgment a person

(1) 14 App. Cas. 337.
(2) 41 Ch. D. 348, 367.
(3) 9 App. Cas. 187, 190.
(4) 14 App. Cas. 343.

cannot be heard to say that he did not know the popular meaning of the words he used. The Defendant here is not at liberty then to say that he understood "capital employed" in a non-natural sense. *Rolls*, therefore, must be taken to have made a wilful misrepresentation. Again, we say that *Rolls* is liable for the fraud of *Ashworth*, his agent, according to the rule laid down by Lord Justice *Bramwell* in *Weir* v. *Bell* (1), following *Barwick* v. *English Joint Stock Bank* (2). The passage at the end of Lord *Herschell's* judgment qualifies what has gone before, and *Rolls* comes within the expression in Lord *Bramwell's* judgment, "he knew that he had no reasonable ground for belief," and on that ground he is to be considered as guilty of fraud.

Moulton, in reply.

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *Kekewich*, who has held the Defendant *Rolls* liable in an action of deceit. The learned Judge relied on this, that *Rolls* was a party to the bringing out of the company, that though he did not issue the prospectus he recognised and sanctioned it, and that the prospectus contained material false statements. The question really turns upon one paragraph in the prospectus. "The annual sales are already very large, and the business at the present time returns a net profit of over 17 per cent. on the capital employed." It is reasonable, as has been argued by Mr. *Warmington*, to refer to other parts of the prospectus to see whether they throw any light on the meaning of the words "capital employed," and also to look at it to see whether it contains anything tending to shew whether the statements in it were honestly made, but I see nothing in the prospectus to explain the words "capital employed," nor do I see anything tending to the conclusion that the statements were dishonestly made, and it speaks for *Rolls'* honesty that he struck out of the draft prospectus the statement that the profits were 20 per cent.

When the action was tried before Mr. Justice *Kekewich* the law as laid down by the Court of Appeal was that a person was liable

(1) 3 Ex. D. 238, 245. (2) Law Rep. 2 Ex. 259.

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in an action for damages if he made a false statement which, though he did not know it to be false, he had no reasonable ground for believing to be true. Since that time the decision of the House of Lords in *Peek* v. *Derry* (1) has displaced that view of the law, and laid down that the Court is to be governed by the old rules as to an action of deceit, so that to make the Defendant liable two things are necessary, the statement must be false and must be made dishonestly. We have, then, to consider not merely whether the statement in this prospectus was true or untrue, but whether if untrue it was dishonestly made. The Lord Justice *Fry* takes a more favourable view of the statement than I do. The expression is a doubtful one, and I do not say that it was positively untrue. I do not, however, enter into the question, which is by no means an easy one, whether the expression "capital employed" ought to be construed in a sense which would make the statement true, for I think that the case must be decided on the second question—whether the statement was dishonestly made. I cannot say that it was. The burden of proof is on the Plaintiff, he charges the Defendant with fraud and he must prove it, the burden does not lie on the Defendant of proving that he made the statement honestly. Before going further I will say that unless fraud is very clearly to be inferred from the documents and the facts proved, we ought not to find the Defendant guilty of fraud if the Judge below has not done so. It has been argued that Mr. Justice *Kekewich* found fraud, but I think he did not, he says that the statement was made "recklessly," by which I think he meant "without having any reasonable ground for believing it to be true." It is conceded that if "capital employed" was understood by the Defendant in the sense in which his Lordship understood it, the statement could not have been made honestly, but I do not think that the Defendant intended to represent that the business was paying 17 per cent. on a capital of £28,000. We have not seen the witnesses, and as the Judge who did has not found the Defendant guilty of fraud we ought not to do so.

Then how does the matter stand? The accountant brought out a profit of 17 per cent., taking the capital as it stood in the

(1) 14 App. Cas. 337.

partnership books. The Defendant assented to this having in his mind the partnership deed. He may have been quite wrong, but the question is whether he acted dishonestly. There is to my mind no sufficient evidence to prove what the House of Lords has held to be necessary, that the statement was made dishonestly. It has been urged on behalf of the Plaintiff that if we are against him, we ought at all events to direct a new trial, since the action was tried when the law was understood to be as was laid down by us in *Peek* v. *Derry* (1). But even as the law then stood it would have been to the Plaintiff's advantage to prove fraud. I think that when there are two ways in which a case can be brought forward and the Plaintiff chooses one of them, it would be wrong, when he has failed on that, to give him afterwards an opportunity of trying the case in the other way. The judgment must be reversed and the action dismissed.

FRY, L.J.:—

This is an action of deceit, and the question turns on a single sentence in the prospectus: "The business at the present time returns a net profit of over 17 per cent. on the capital employed." Before Mr. Justice *Kekewich* the case went on this, that the statement was false in fact, and that though the Defendant believed it to be true, he believed so without any reasonable ground, and the learned Judge decided in favour of the Plaintiff. According to the decision of the House of Lords in *Peek* v. *Derry* (2), those grounds are inadequate to support the Plaintiff's case, and it has been argued before us that the allegation was false in fact, and that the Defendant knew it to be untrue when he made it. We who have not seen the witnesses are asked to convict the Defendant of fraud when the Judge below has not found him guilty of it. This could only be done in a very strong case. The only relief to be hoped for from this appeal was a new trial, and the real question before us is whether we ought to direct a new trial. I think that we ought not. I agree with the Lord Justice in thinking that there is great danger in allowing a new trial for the sake of trying a case not presented to the Court below. The Plaintiff here might have brought forward at first

(1) 37 Ch. D. 541. (2) 14 App. Cas. 337.

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the case that the statement was false to the Defendant's knowledge. Moreover, I do not think the case one where we ought to put the Defendant to the expense and risk of a second trial. I am by no means convinced that the statement was untrue in point of fact. The best evidence of what was considered to be the capital employed in the business is the partnership deed of 1885. The father was dealing with his sons; there is no reason to doubt that an honest estimate was made of the state of the business, and a sum was fixed on which the father was to receive interest as being his capital, and he says that, so far as he knew, no capital was withdrawn or added. If it were necessary to decide the point, I should consider what was intended by "capital employed" to be less than £13,000 and in that case the profits would be more than 17 per cent. But it is unnecessary to decide that, for, supposing the statement to be untrue, the question remains whether it was made dishonestly. No accurate accounts of the business appear to have been kept, there were no materials ready to hand from which the percentage of profits could at once be arrived at. The Defendant gave the best information he had, and it is to my mind impossible to come to the conclusion that he did not believe the statement to be true when he made it.

LOPES, L.J.:—

It is unnecessary to express any opinions as to whether the decision of Mr. Justice *Kekewich* would have been right if the decision of the Court of Appeal in *Peek* v. *Derry* (1) had not been reversed in the House of Lords.

The House of Lords have held that if a statement is untrue in fact, but believed to be true, though without any reasonable grounds for such belief, no action for deceit will lie.

There must be moral delinquency, some dishonesty. Lord *Herschell* and the other Lords adopt the first three definitions of fraud necessary to support an action of deceit which I gave in *Peek* v. *Derry* (2), the fourth he and the other learned Lords reject. The fourth definition was, if the statement is untrue in fact, but believed to be true, without any reasonable grounds for such

(1) 37 Ch. D. 541. (2) 37 Ch. D. 585.

belief. It is on this definition of fraud that the learned Judge in the Court below acted.

The House of Lords, as I read the opinions of the learned Lords, have held that the inaccuracy of a statement, however unreasonable, if honest and *bonâ fide*, will not support an action for deceit. I presume because it does not contain the necessary element of dishonesty. So that if a prospectus contains a statement which 99 persons out of 100 would understand in a sense which would make it obviously inaccurate, still, if the party making it honestly believed that it bore a meaning which would make it accurate, no action would lie, the obvious inaccuracy and unreasonable belief being evidence of dishonesty, but not of themselves ground of an action.

For the reasons given by the other members of the Court I do not think there was in this case any evidence of dishonesty within the meaning of *Peek* v. *Derry* in the House of Lords (1), the burden of proving fraud or dishonesty being on the Plaintiff. For reasons given, I also think there should not be a new trial.

Solicitors for Plaintiff: *Byrne & Lucas.*
Solicitor for Defendant: *E. T. Tadman.*

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Patent—Exclusive License for limited Time and Area—Right of Licensee to sue—Non-joinder of Patentee—Effect of License—Registration—Sub-Purchase—User within Area of patented Article purchased outside Area—Notice—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 36, 87.

An exclusive license is a leave to do a thing, and a contract not to allow anyone else to do the thing; but, unless coupled with a grant, it confers no more than any other license any interest or property in the thing, and the licensee has no title to sue in his own name.

A patentee of machinery, by deed duly registered under the *Patents, Designs, and Trade Marks Act,* 1883, s. 23, granted to the Plaintiff the full and exclusive license to use and exercise the patented invention within a specified district for a limited period, and covenanted during that period not to sell or to grant any license to exercise or use the invention to any

(1) 14 App. Cas. 337.

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other person in the same district; and in case the patent should be infringed, he covenanted to take all necessary proceedings for defending the same, and that in default of his so doing it should be lawful for the Plaintiff to take such proceedings in his (the patentee's) name.

The patentee afterwards sold two of the patented machines to firms outside the specified district, and these firms sold them to the Defendants, who used them within the district; and it was in dispute whether or not the Defendants had actual notice of the exclusive license at the time of their purchase.

Upon an action brought in the County Palatine Court of *Lancaster* by the Plaintiff in his own name, and without joining the patentee, against the Defendants, it was *held* by the Vice-Chancellor, in dismissing the action, first, that registration under the *Patents, Designs, and Trade Marks Act* was not notice to all the world; secondly, that upon the evidence the Defendants had no actual notice of the exclusive license at the time of their purchase; thirdly, that the Defendants, being purchasers for value without notice, were not affected by the license; and fourthly, that it was doubtful whether an action for infringement of rights under a license could be brought by an exclusive licensee in his own name, without joining the patentee as co-Plaintiff:—

Held, by the Court of Appeal, in dismissing the appeal, first, that actual notice had not been proved against the Defendants; secondly, that the exclusive license, being simply an authority to do lawfully that which would otherwise have been unlawful, and not being a license coupled with or equivalent to a grant, did not entitle the licensee to sue in his own name without joining the patentee; and this being so, that it was immaterial to consider the effect of registration under the Act of 1883.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine Court of *Lancaster* given on the 18th of July, 1888, in an action by *Charles Heap*, claiming as assignee or exclusive licensee for a particular district, of a patent, an injunction to restrain the Defendants *Israel Hartley* and *Edward Hartley* from using the invention described in the patent, or any colourable imitation thereof, within the district, or from otherwise infringing the rights of the Plaintiff in the patent, and for damages, an account, inspection and costs.

The invention was for improvements "in gig mills employed in the finishing of woven fabrics," and the letters patent for it were granted to *Charles Edward Moser* on the 30th of September, 1885, and were numbered 11,640 of 1885.

By indenture dated the 15th of November, 1886, *Moser* granted to the Plaintiff "the full and exclusive license to use and exercise the said patented invention at all places as well

within the borough of *Rochdale* as within the districts of the local boards of *Norden, Wardle,* and *Littleborough,* and *Milnrow,* according to the said invention, for the term of two years"; and covenanted that, subject to a right on his part to sell the invention, and to grant licenses to certain specified firms to use the same for their individual use without power of resale or transfer, he, *Moser,* would not "during the said period of two years either sell the said patented invention or grant or give any license or authority to exercise or use the same to any company, persons or person carrying on or having a place of business" in the district to which the license extended; and further, that in case the said letters patent or any extension or renewal thereof should be infringed, *Moser* should forthwith, after notice of such infringement, at his own cost, take all necessary proceedings for effectually protecting and defending the same, and in default of his so doing it should be lawful for the Plaintiff at his own cost, but in *Moser's* name, to take all necessary proceedings for effectually protecting and defending the same.

This deed was registered at the Patent Office on the 27th of November, 1886, and the period of two years mentioned therein was extended to four years by indenture dated the 12th of September, 1887, which was registered at the Patent Office on the 30th of September, 1887.

Early in the year 1888, *Moser* sold one of the machines made under his patent, which were known as "raising machines," to the *Victoria Raising Company* of *Manchester,* and another to Messrs. *Scott & Whitworth* also of *Manchester.* These two machines were on or before the 17th of February, 1888, bought from the *Victoria Raising Company* and *Scott & Whitworth* by the Defendants *Israel* and *Edward Hartley* for the purpose of a business which they carried on, or were about to carry on, in partnership at the *Victoria Mills, Littleborough,* within the district to which the Plaintiff's license extended. And these machines were temporarily put up by the Defendants in a room in the *Dearnley Mills,* also within the district, where *Stephen Hartley,* a brother of *Israel Hartley,* carried on business.

This having come to the knowledge of the Plaintiff, his solicitors wrote to the Defendants on the 23rd of February, 1888, that

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the purchase and user of these machines was an infringement of the Plaintiff's right as exclusive licensee within the district, and that if such user was continued proceedings would be taken against the Defendants.

The user was continued. This action was brought on the 2nd of May, 1888, and on the 10th the Plaintiff gave notice of motion for an injunction and inspection.

The evidence as to whether the Defendants before they bought the two machines had actual notice of the exclusive license granted to the Plaintiff for the district was of a conflicting character. On the part of the Plaintiff there was some evidence that at an interview between *Stephen Hartley*, *Israel Hartley*, and a workman named *Lord*, on the 29th of October, 1887, mention was made of "raising machines," and that on the same day *Stephen Hartley* wrote to *Moser* for one of his raising machines, afterwards receiving an answer from *Moser*, dated the 31st of October, 1887, that he was unable to send the machine, as he had given the Plaintiff the exclusive use of his patent for a certain time in *Stephen Hartley's* district; and further, that at another interview between *Stephen Hartley*, *Israel Hartley*, and *Lord* and his wife, in January, 1888, when mention was made of an agreement between *Moser* and the Plaintiff, one of the *Hartleys* said, "It is true enough." This was, however, denied by *Israel Hartley* in his evidence in reply, and there was no cross-examination upon the question of actual notice to the Defendants of the Plaintiff's exclusive license. This evidence is also referred to in the judgments of *Cotton* and *Fry*, L.JJ.

The motion was heard by the Vice-Chancellor of the County Palatine on the 13th of July, 1888, and having been by consent treated as the trial of the action, the Vice-Chancellor held, first, that registration, under the *Patents, &c., Act*, 1883, of an exclusive license was not in itself notice to all the world that such a license had been granted; secondly, that, upon the evidence, the Defendants had no actual notice of the exclusive license at the time of their purchase of the machines; and thirdly, that the Defendants, being purchasers for value without notice, were not affected by the prior grant of the license to the Plaintiff. And his Honour dismissed the action, and expressed a doubt

whether an action to restrain an infringement of rights under an exclusive license could be brought and maintained by the licensee in his own name without joining the patentee as a co-Plaintiff.

The Plaintiff appealed.

Moulton, Q.C., and *Staffurth*, for the Appellant:—

A patentee is, according to sect. 46 of the *Patents, &c., Act*, 1883, "the person for the time being entitled to the benefit of a patent." An exclusive licensee for a particular district, whose license is duly registered under sects. 23 and 87 of the same Act, is *quâ* that district, and during the term of the license, in the position of a person to whom the patentee has given his monopoly and all his beneficial rights. He is practically an assignee *pro tanto* of the patent, and is entitled to maintain an action for infringement of his rights within the district, in his own name, and without joining the patentee: *Patents, &c., Act*, 1883, s. 36; *Renard* v. *Levinstein* (1); *Newby* v. *Harrison* (2); *Hassall* v. *Wright* (3); *Derosne* v. *Fairie* (4). Again, a patent is severable, and the assignee of a severed portion of the patent may sue for an infringement affecting that part without joining one who has an interest in another part: *Dunnicliff* v. *Mallet* (5); *Hassall* v *Wright*.

The patentee could not give other licenses in derogation of his own exclusive grant, and would not be entitled himself to infringe his own patent within the district.

The register has given notice to all the world of the rights of the exclusive licensee, and the Defendants with such notice have infringed those rights by using the patented invention within the district without the leave of the licensee. The permission of the patentee would be of no avail, for every license he grants must be subject to the rights already on the register. If *Moser*, when he sold these machines to the Defendants, had given them an express license to use them all over the kingdom, that license would have been a nullity as to this district, for as to that district

(1) 2 H. & M. 628.
(2) 1 J. & H. 393.
(3) Law Rep. 10 Eq. 509.
(4) 1 Webs. Pat. Cas. 155.
(5) 7 C. B. (N.S.) 209.

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he could give no rights whatever. He, however, gave no such license or permission. The Plaintiff is the only person injured, and the only necessary Plaintiff, and the non-joinder of the patentee cannot defeat the action. If, however, there is a want of necessary parties, the objection should have been taken before. Moreover, actual notice to the Defendants is not necessary, because by the patent law the right to restrain an infringement is independent of notice, and the Defendants have infringed this patent within the district covered by the license. But upon the facts there was actual notice and knowledge of the Plaintiff's rights by the Defendants.

[They also cited *Webber* v. *Lee* (1); *Muskett* v. *Hill* (2).]

Cozens-Hardy, Q.C., and *Maberly*, for the Respondents:—

[COTTON, L.J.:—You may confine yourselves to the question of actual notice.]

The writ simply seeks an injunction for infringement of patent; there is no claim for conspiring with *Moser* to procure goods within the district. The original purchasers from whom we bought acquired their machines without any notice of the Appellant's rights as licensee, and no one who buys through an innocent person can be fixed with notice. There is no allegation of contrivance, collusion, or fraud, and even if the Respondents had notice, it was merely notice that the Appellant was licensed to do something within a limited area and time, which he could not have done without that license. But in fact there is no evidence of any notice sufficient to bind the conscience of the Defendants.

Staffurth, in reply, referred to *De Mattos* v. *Gibson* (3); *Messageries Impériales* v. *Baines* (4); *Catt* v. *Tourle* (5); *Werderman* v. *Société Générale d'Electricité* (6); *Holroyd* v. *Marshall* (7).

COTTON, L.J.:—

The last point argued by Mr. *Moulton* was that of notice, but I think it advisable to deal with that question first, because it

(1) 9 Q. B. D. 315.
(2) 5 Bing. N. C. 694.
(3) 4 De G. & J. 276.
(4) 11 W. R. 322.
(5) Law Rep. 4 Ch. 654.
(6) 19 Ch. D. 246.
(7) 10 H. L. C. 191.

ought to be disposed of before we come to the question of whether an exclusive licensee can sue for an infringement of a patent.

The Vice-Chancellor has held that the Plaintiff has not made out that on which his title depended, viz., that the Defendants bought this machine with notice of the agreement which had been entered into between the Plaintiff and the patentee. In my opinion that is so; and it was for the Plaintiff to make that out, not as something which occurred incidentally, but as being the very foundation of his right to relief, unless he could establish that an exclusive licensee can, as such and independently of notice, sue a man for infringement of a patent. I will deal with that presently, but to my mind the title of the Plaintiff to relief depends upon notice, and therefore it was for him to make out to the satisfaction of the Court that the Defendants had notice. I agree that the case is one of some little suspicion, but that is not enough. The Plaintiff in this action did not originally raise any case of actual notice, but notice has come in incidentally, and in a rather awkward sort of way. The Plaintiff stated, and supported by affidavits, the agreement that was made between the patentee and himself. Then in answer to those affidavits the Defendant said, "I had no notice of this," but in cross-examination he said, "Oh, I do recollect something about it, which was mentioned to me by *Stephen Hartley*." What is strongest against the Defendants on this point is a joint affidavit by a workman named *Lord* and his wife. But that was answered by an affidavit of one of the Defendants, and there was no cross-examination at all as regards the matters upon which the Plaintiff might have relied in order to shew notice either as to those affidavits of the *Lords*, or as to the answer by the Defendant. To my mind this is rather a striking circumstance, and in my opinion it would be wrong merely upon that, as to which there was no cross-examination, and no opportunity therefore of the Defendants giving any explanation, to hold that they had notice of the agreement that was made between the patentee and the Plaintiff.

That being so, we come to the simple question whether an exclusive licensee for a particular district can sue in his own name a person acting in alleged violation of his rights under the license, without proving as against such person notice of those

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rights? My opinion is that the licensee cannot so sue. It is said that this is an exclusive license, and must be construed just in the same manner as if it had been a grant of a patent right for a limited period and for a limited space. But it is a very different thing; and some of the cases that have been referred to shew clearly the distinction between licenses which amount to a grant and licenses which do not do so. One of those cases is the ice case (*Newby* v. *Harrison* (1)), and there the Vice-Chancellor shews that where there is only a license which does not entitle the licensee to take anything away, or to acquire any property, then the license simply remains a license, that is, an authority from the person who grants it to the person who receives it, enabling him to do lawfully that which without the license he could not do; and that where there is a license which not only enables the licensee to do something lawfully which otherwise he could not do, but also enables him to acquire something or to take away something, like game, or ice, in consequence of the license, then the license amounts to a grant. That is pointedly put in the judgment of Lord *Hatherley*, then Vice-Chancellor, in this way (2):—"With regard to the word 'license,' there is some little ambiguity. It is, however, well defined in the case of *Muskett* v. *Hill* (3), and I prefer stating it in the language there cited by Chief Justice *Tindal* to giving my own. It is thus stated:—'A dispensation or license properly passes no interest, but only makes an action lawful which without it had been unlawful; as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful; but a license to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down; but as to carrying away the deer killed and the tree cut down, they are grants.' So here, a license to enter upon a canal and take the ice is a mere license; and the right of carrying it away is a grant of the ice so to be carried away." So that points out the distinction between a license and a grant, and in my opinion the license in this case, although it is an exclusive license, and for a

(1) 1 J. & H. 393. (2) 1 J. & H. 398. (3) 5 Bing. N. C. 694.

limited time, can in no way be considered as a grant of the letters patent, but is simply a license to do that which without that license would be a violation of the monopoly of the patentee.

That this exclusive license was not intended to be a grant to the licensee of any right to sue is, I think, clear from the fact that there is in it a conditional contract that if there was any infringement either within or without the district, then the patentee would allow the licensee to use his (the patentee's) name, in order to sue the infringer. What is granted may be put thus:—"You may use this within this particular district for this particular time. I do not give you any right which will enable you to sue, but if there is any one who is violating my patent right, and therefore infringing the right which I have given to you, or doing that even without infringing the right, because he may do it outside; having regard to the license which I have granted, I will allow you to use my name, in order to sue the person who has committed such an act." If in this case any act had been done in violation of the agreement between the licensee and the patentee, then the licensee would have had the right to sue the patentee, but it is not alleged that there was any such violation. All that is contended is that an exclusive license is equivalent to a grant, and that the licensee may, without the concurrence of the patentee, or without there having been any violation of the agreement between the patentee and himself, sue the person who is infringing the rights conferred by the license. In my opinion that is wrong. That is turning that which is merely a license into something very different, namely, a grant of the whole letters patent, and in my opinion, therefore, the Plaintiff fails. I do not think it is necessary to go into the questions argued by Mr. *Moulton* as to the effect of the *Patent Act*, because if he cannot sue except in the name of the patentee, it is immaterial to consider whether the Act, by sect. 87, does render what these Defendants have done within the district an infringement or not, or an infringement against the patentee. If the Plaintiff cannot sue then it is immaterial to consider the question whether this is to be considered as a right which the patentee could not grant, and therefore as an infringement against the patentee.

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In my opinion the judgment was right, and the appeal must be dismissed.

FRY, L.J.:—

I am of the same opinion. The Plaintiff in this case sues under an exclusive license to use a certain invention for a certain time, and within a limited district. He sues a person who he says is using that patented invention within the district, and without his license. Now he puts his case in a two-fold manner. He says: "In the first place, as exclusive licensee, I am in the position of an assign of the letters patent for that district and for that term, and as an assign of letters patent, I have a right to restrain any person who is infringing within the district." That argument appears to be based on an entire error with regard to the nature of a license. An exclusive license is only a license in one sense; that is to say, the true nature of an exclusive license is this. It is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. But it confers like any other license, no interest or property in the thing. A license may be, and often is, coupled with a grant, and that grant conveys an interest in property, but the license pure and simple, and by itself, never conveys an interest in property. It only enables a person to do lawfully what he could not otherwise do, except unlawfully. I think, therefore, that an exclusive licensee has no title whatever to sue.

Then, in the second place, the Plaintiff puts his case in this way. He says: "The exclusive license implies a contract not to grant to anybody else within the district. The Defendants took these machines with notice of that contract, and it would be unconscientious to allow them to use machines in such a manner as to violate the contract of which they had notice." Had they, then, notice of the contract? In my opinion that is not proved. I agree that there are many circumstances of suspicion; many circumstances which might make an investigation of the matter reasonable; many circumstances which I think the Plaintiff, if he had been minded, might have probed into far more deeply than he has ever attempted to do in this case. But, in fact, he did not launch his case upon the ground of notice. That, I

think, is not his true cause of action as he perceived it, and understood it at the time he began his action; and on such ragged evidence as there is of notice he has entirely failed to satisfy me.

Therefore I agree with the Lord Justice that this appeal fails.

LOPES, L.J.:—

I am of the same opinion. I do not desire to add anything.

Solicitors: *H. G. Church*, agent for *Jacksons & Godby, Rochdale; Radford & Frankland*, agents for *Bowden & Walker, Manchester.*

W. W. K.

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May 8, 17.
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July 30;
Aug. 1, 8.

[1888 T. 1392.]

Bill of Sale—Registration—Absolute Assignment—Subsequent Bill of Sale as Security—"True Owner"—Mistake in Date of Register—"True Copy"—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10 [*Revised Ed. Statutes, vol. xviii, p.* 654]—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 5, 6—*Practice—Judgment—Stay of Execution—Special Circumstances.*

The 10th section of the *Bills of Sale Act*, 1878, applies to absolute assignments as well as to assignments by way of security.

The owner of certain household furniture in 1885 assigned it by a deed of absolute gift to the Plaintiff, who was his wife, and the goods were soon afterwards transferred to his son's house where the Plaintiff lived. This deed was not registered. After the transfer the grantor executed another bill of sale to the Defendants as security for a loan, which was registered. After the death of the grantor the Defendants seized the goods, and the Plaintiff brought an action to restrain them from dealing with or remaining in possession of them:—

Held, by *Cotton* and *Fry*, L.JJ. (*dissentiente Lopes*, L.J.), that the first bill of sale, although it ought to have been registered under sect. 10 of the *Bills of Sale Act*, 1878, was not absolutely void, and, therefore, the grantor was not the "true owner" of the goods at the time of his executing the second bill of sale, and, consequently, the second bill of sale was made void by the 5th section of the *Bills of Sale Act* (1878) *Amendment Act*, 1882, against all persons except the grantor. The Plaintiff was, therefore, entitled to succeed in the action:

Held, by *Lopes*, L.J., dissenting, that the 5th section of the *Bills of Sale*

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Act (1878) *Amendment Act*, 1882, only applied to after-acquired property of the grantor, and that the second bill of sale was not made void by that section.

Per Kay, J.:—An application to stay execution under the judgment in an action should, unless it is made the moment after the judgment has been pronounced, be supported by an affidavit shewing the special circumstances on which the applicant relies.

ON the 8th of September, 1885, *T. G. Tuck* executed a deed of gift whereby he assigned to his wife, *Harriet Tuck*, the household furniture in his house. The furniture was soon afterwards removed to another house which belonged to *Edward Tuck*, the son of Mr. and Mrs. *Tuck*, and Mrs. *Tuck* went to reside in the house with her son. The deed was not registered as a bill of sale.

On the 5th of April, 1888, *T. G. Tuck* executed a bill of sale of the same furniture to the Defendants, the *Southern Counties Deposit Bank*, by way of security for the repayment of £35, advanced by them to him with interest at the rate of 5 per cent. per month. This security was registered as a bill of sale, but the copy required by the 10th section of the *Bills of Sale Act*, 1878, to be filed with the Registrar was dated the 5th of March instead of the 5th of April, although the affidavit filed with it under the same section stated the correct date; and in the index of bills of sale kept by the Registrar the date was also correctly stated.

On the 31st of July, 1888, *T. G. Tuck* died, and the Defendants seized the furniture. Mrs. *Tuck*, the widow, then brought an action against the Defendants for an injunction and damages, claiming the furniture under the deed of gift. £50 had been paid into Court by the Plaintiff pending the action, and the Defendants had withdrawn from possession of the furniture, and consented to an interim injunction without prejudice to any question.

The action came on for trial before Mr. Justice *Kay* on the 8th of May, 1889. The principal sections referred to in the arguments at the trial and on the appeal were the *Bills of Sale Act*, 1878, ss. 3, 4, 8, 10, and the *Bills of Sale Act*, 1882, ss. 5, 6 (1).

(1) 41 & 42 Vict. c. 31 (*Bills of Sale Act*, 1878), s. 3: "This Act shall apply to every bill of sale executed on or after the 1st day of January, 1879 (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice,

Butcher, for the Plaintiff:—

First, under the deed of gift the absolute property in the

and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

Sect. 4: "In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; (that is to say,)

The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, *India* warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

* * * *

Sect. 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom

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furniture passed to the wife: *Married Women's Property Act*, 1882, s. 1, sub-s. 1; s. 5.

the process has issued under or in the execution of which such bill has been made or given, as the case may be)."

Sect. 10: "A bill of sale shall be attested and registered under this Act in the following manner:

(1.) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor:

(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the Registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:

* * * *

In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

A transfer or assignment of a registered bill of sale need not be registered."

45 & 46 Vict. c. 43 (*Bills of Sale Act* (1878) *Amendment Act*, 1882)—

Sect. 5: "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale."

Sect. 6: "Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things; (that is to say,)

(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed:

(2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale."

Secondly, the Defendants' bill of sale was invalid, since the copy required to be filed by sect. 10, sub-sect. 2, of the *Bills of Sale Act*, 1878, was not a "true copy," the date in the copy being wrong: *Ex parte Kahen* (1).

[KAY, J., referred to *Sharp* v. *McHenry* (2).]

Arnold White (*Muir Mackenzie*, with him), for the Defendants:—

The assignment to the Plaintiff was a "bill of sale," within sect. 4 of the *Bills of Sale Act*, 1878, and therefore required registration. Under sect. 10 our registered bill of sale, though subsequent in date, takes priority over the Plaintiff's unregistered bill of sale: *Conelly* v. *Steer* (3); *Lyons* v. *Tucker* (4).

As to the gift to the wife, if it is to be treated as in the nature of a post-nuptial settlement, such settlements do not come within the exceptions to bills of sale contained in sect. 4 of the Act of 1878. Again, the gift was void as against creditors under the statute of 13 Eliz. c. 5.

[KAY, J.:—You have not raised that point by your pleadings.]

I submit it was not necessary to do so. If the gift was void under the statute, the property in the chattels remained in the grantor.

As to the error of date in the copy of our bill of sale, it is immaterial. It was obviously a mistake, and could mislead no one, for it could be at once corrected from the affidavit filed with it: *Reed* on the *Bills of Sale Act*, 1878 (5); *Darvill* v. *Terry* (6); *Buckeridge* v. *Flight* (7); *Taylor* to *Bentley* (8); *Lamb* v. *Bruce* (9).

[KAY, J., referred to *Ex parte Webster* (10).]

Butcher, in reply:—

As to the point on the *Statute of Elizabeth*, the Defendants ought to have counter-claimed that the deed of gift was void. But they cannot plead the statute in this form of action, for they

(1) 21 Ch. D. 871.
(2) 38 Ch. D. 427.
(3) 7 Q. B. D. 520.
(4) Ibid. 523.
(5) 3rd Ed. p. 62.
(6) 6 H. & N. 807.
(7) 6 B. & C. 49.
(8) 8 B. & S. 190.
(9) 45 L. J. (Ex.) 538.
(10) 22 Ch. D. 136.

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are not setting up a claim as creditors, or on behalf of themselves and other creditors, but merely as assignees; and the statute is only for the protection of creditors: *Reese River Silver Mining Company* v. *Atwell* (1).

But further, under sect. 3 of the *Bills of Sale Act*, 1882, my assignment is not a bill of sale at all, not being "a security for the payment of money," and it is thus excepted from the Act of 1878.

KAY, J.:—

It is necessary to tread very warily where one has anything to do with the law of bills of sale. In this case I confess my opinion has varied from time to time as the argument proceeded. The facts are these:—[His Lordship then stated them, and continued:—] My attention was first called on behalf of the Defendants to sect. 4 of the Act of 1878, under which undoubtedly such a document as this deed of gift would be a "bill of sale," because it is an assignment of "personal chattels," and all such assignments are included in that section. It does not matter, according to that Act, whether the assignment is made as security or by way of absolute assignment. Sect. 8 avoided an unregistered bill of sale only as against the trustee or assignee in bankruptcy or liquidation of the grantor, and as against sheriffs and other persons seizing in execution, and also as against every person on whose behalf the execution was issued; but the *Bills of Sale Act*, 1882, avoids an unregistered bill of sale absolutely against everybody.

In the present case, the defence raised by the Defendants upon the Act of 1878 is clearly bad, because they are neither trustees in bankruptcy nor execution creditors of *Tuck*. Now, by the amending Act of 1882, s. 3, it is provided that "the expression 'bill of sale,' and other expressions in this Act, have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in sect. 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply."

(1) Law Rep. 7 Eq. 347.

That is to say, this Act of 1882, which avoids a bill of sale not merely as against the trustee in bankruptcy of the grantor, and an execution creditor of the grantor, but as against everybody, does not apply to any bills of sale except such as are given by way of security for money. But the deed of gift given by this grantor to his wife was not given to her by way of security for money, and is therefore not avoided by the Act of 1882; and accordingly these Defendants, who claim that it is void as against them, and who can only make that claim under the Act of 1882, fail in their contention, because the deed is not a security for money. Therefore I must hold that this defence is not a valid defence, and that the Plaintiff is entitled to the relief which she asks.

But then it was said that if the deed of gift is not void under the *Bills of Sale Acts*, it is void under the *Statute of Elizabeth*—13 Eliz. c. 5: but the statute only avoids a gift or grant of chattels when made with intent to hinder, delay or defraud creditors; and if the person who claims to set aside a gift or grant on that ground was not himself a creditor at the time it was executed he must prove that there were creditors at the time who had not been satisfied. There is no such defence here. The defence is not by persons claiming as creditors but by persons who assert that they are entitled to the possession of certain specific property. They are not defending as creditors at all. If such a defence had been available it should have been asserted by counter-claim or by a separate action by the Defendants on behalf of themselves and all other creditors, raising the point that the deed of gift was invalid because it was calculated to delay, hinder, and defraud the creditors of the grantor within the meaning of the *Statute of Elizabeth*. I cannot allow that point to be raised on these pleadings; and in my opinion it could not be raised by defence but by counter-claim or by separate action. I cannot now allow any amendment to be made by the Defendants in the nature of a counter-claim.

The only order I can make must be in the terms of the writ; that is to say, there must be judgment for an injunction to restrain the Defendants from taking possession and dealing with the furniture; also an inquiry as to damages: the money in

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Court must be paid out to the Plaintiff, and the Defendants must pay the costs of the action.

1889. May 17. *Muir Mackenzie*, for the Defendants, now moved for stay of execution under the above judgment, so far as related to the order for payment out of the £50, pending an appeal.

J. G. Butcher, for the Plaintiff, submitted that stay of execution under a judgment would only be granted on special grounds, to be supported by affidavit: Annual Practice, 1889 (1); *Bradford* v. *Young* (2); *Barker* v. *Lavery* (3).

KAY, J.:—Where such an application as this is made at the moment of giving judgment, and when the Court has all the facts before it, the Court may see reason for granting it; but when the application is made some time afterwards, when the Judge cannot be expected to remember the facts, how can it be reasonable to ask the Court to make an order that the judgment be suspended, when no special circumstances for suspending it are shewn? I must refuse this application.

G. I. F. C.

From this judgment the Defendants appealed. The appeal came on to be heard on the 30th of July, 1889.

Reed (*Muir Mackenzie*, with him), for the Appellants:—

The first bill of sale under which the Plaintiff claims required registration, and as it was not registered the Defendants' bill of sale has priority over it under sect. 10 of the *Bills of Sale Act*, 1878. There is no distinction in that Act between bills of sale which are an absolute assignment of chattels and those which are given for a security. The Plaintiff contends that the section can only apply to a case where there are two bills by way of security because where the first assignment is absolute the second is a nullity. But the effect of the section is that the second being registered is taken to have been executed before the first, if

(1) Page 785. (2) 28 Ch. D. 18.
(3) 14 Q. B. D. 769.

unregistered; and the interest of the grantor therefore passes under it: *Lyons* v. *Tucker* (1); *Conelly* v. *Steer* (2); *Swift* v. *Pannell* (3). It makes no difference that there was a delivery of possession of the chattels. If the deed was not registered the whole transaction was postponed to the subsequent registered security. It is also contended that the grantor was not the true owner at the time of the execution of the second bill of sale under sect. 5 of the *Bills of Sale Act*, 1882. But the first bill of sale was void under sect. 8 of the Act of 1878 against assignees in bankruptcy and execution creditors. The grantor still had an interest which he could assign: *Sharp* v. *McHenry* (4); *Gardnor* v. *Shaw* (5); *Ex parte Kahen* (6); *Jones* v. *Harris* (7). With respect to the error in the date of the true copy filed in the registry, the error was corrected in the affidavit, and in the list of bills of sale kept in the registry, and is immaterial.

Butcher, for the Plaintiff:—

The Plaintiff's bill of sale did not require registration to give it priority over the Defendants' bill of sale. Assuming that it was a bill of sale within the *Bills of Sale Act*, the 10th section of the Act of 1878 has no application, for that section only applies to cases where both bills are securities for loans, and does not apply where the first bill of sale is an absolute assignment; in such cases there can be no question of priority, for the grantor has no interest at the time of the execution of the second bill of sale, and the second bill of sale is a nullity. If the Legislature had intended the section to have the effect which the Appellants contend for, they would have declared the first unregistered bill of sale void, and not have merely postponed it to the second, as in the *West Riding*, *North Riding*, and *Middlesex Registry Acts*. Sect. 8 is the only section which applies to the Plaintiff's bill of sale, and the only penalty there imposed for non-registration is that it is void against assignees in bankruptcy and creditors: *Conelly* v. *Steer*; *Chapman* v. *Knight* (8).

(1) 7 Q. B. D. 523.
(2) Ibid. 520.
(3) 24 Ch. D. 210.
(4) 38 Ch. D. 427.
(5) 24 L. T. (N.S.) 319.
(6) 21 Ch. D. 871.
(7) Law Rep. 7 Q. B. 157.
(8) 5 C. P. D. 308.

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But we contend that the Plaintiff's assignment did not require registration at all within the *Bills of Sale Acts*, because it was perfected by delivery of the chattels. The object of the *Bills of Sale Acts* was protection against fraud through the goods remaining in the possession of the grantors. They are not meant to extend to an absolute assignment with delivery of possession: *Richards* v. *James* (1).

There is another objection to the Defendants' bill of sale that it is void under the 5th section of the *Bills of Sale Act*, 1882, because the grantor was not the true owner. Whether the first bill of sale required registration or not the grantor was not the true owner of the goods at the time of his executing the Defendants' bill of sale: for he had absolutely assigned all his interest to the Plaintiff.

We also object to the Defendants' bill of sale, that the registration was irregular and defective; there was no true copy of the deed, the date being erroneous. It is said that the error was corrected in the affidavit, but that is not sufficient. The object of the provision is that those who search the registry may not be misled, and this is a mistake which is important and might mislead an intended assignee of the goods: *Ex parte Kahen* (2); *Sharp* v. *MacHenry* (3); *Lamb* v. *Bruce* (4); *Jones* v. *Harris* (5).

Muir Mackenzie, in reply:—

With respect to sect. 5 of the Act of 1882, the grantor was the true owner at the time of the execution of the Defendants' bill of sale. The 10th section of the Act of 1878 must be read with the 5th section of the Act of 1882, and makes the first bill void. Moreover, the 5th section only applies to after-acquired property, and does not affect these chattels at all. That construction best harmonizes it with the 10th section of the former Act.

COTTON, L.J.:—

This case raises a nice point, and one which I think is new under the *Bills of Sale Acts*. The Plaintiff claims under a deed

(1) Law Rep. 2 Q. B. 285.
(2) 21 Ch. D. 871.
(3) 38 Ch. D. 427.
(4) 24 W. R. 645.
(5) Law Rep. 7 Q. B. 157.

of gift executed by her late husband, and the Defendants claim under a subsequent bill of sale executed by the same person by way of security for a loan. The first deed was not registered; the second deed was duly registered under the *Bills of Sale Acts*. The Defendants seized part of the property comprised in their bill of sale, and the Plaintiff brought this action to restrain them. The Judge has decided that the Plaintiff is entitled to relief on the ground that the Plaintiff's deed is good against the Defendants, but it appears to me that the Judge did not decide the case on the grounds on which it ought to be decided.

Two questions arise for decision. In the first place it is said that the first deed did not require to be registered as a bill of sale, because it was a common law assurance followed by delivery of possession of the goods. Whether there was delivery of possession or not I think the definition of a bill of sale which requires registration cannot be limited in the way contended for by the Plaintiff. I think that sect. 8 of the Act of 1878 clearly applies to every bill of sale to which the Act applies, and that this deed of gift is a bill of sale within the definition of a bill of sale in the Act. But it was said that registration was only necessary with regard to the provision which makes it void against trustees, assignees in bankruptcy, and execution creditors of the grantor, and that it does not require registration as against any other persons. I do not agree with that view. Sect. 8 points out some of the persons against whom it will be void, but it does not exhaust all the consequences of its want of registration. In my opinion, therefore, the first deed ought to have been registered.

Then we come to sect. 10 of the same Act of 1878. The last clause is as follows: "In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels." The Plaintiff contended that the section had only reference to two bills both of which are given by way of security, and that that was shewn by the use of the word "priority," which could only apply to securities. I think we should be wrong in limiting the section in that manner. It is true that it does not say that the first bill, if unregistered,

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shall be void, but only that the second if registered, shall have priority: but the meaning of that is though the unregistered bill of sale is made first, the second bill, though made after the first, shall be considered to have been made before it.

If the case stopped here I think the Defendants would be entitled to judgment, but unfortunately it does not stop here. In 1882 another Act was passed which is to be read with the Act of 1878, and all provisions in that Act which are inconsistent with the provisions of the Act of 1882 are to be considered as repealed. Therefore we must read the Act of 1878 as if sect. 5 of the Act of 1882 were inserted, and that section says that every bill of sale shall be void except as against the grantor unless the grantor was at the time of executing it the true owner of the property comprised in it. The effect of that provision is, that unless the Plaintiff's husband can be said to have been the true owner at the time of the execution of the second bill of sale relied upon by the Defendants, it can have no effect. In my opinion it cannot be said that he was the true owner of the chattels at the time when the second bill of sale was given. If the first bill of sale was absolutely void, he would have been the true owner at the time when the second was given. But the first bill of sale is not made entirely void by non-registration but only made subject to the provisions of the Act of 1878, that is, void as against trustees, assignees in bankruptcy, and execution creditors, and subject to be postponed to registered bills of sale. It cannot be said that because that effect is given to a second bill, if registered, this makes the grantor of such a bill the true owner.

It was indeed contended that sect. 5 applies only to chattels which were to become the property of the owner after the execution of the bill of sale. After-acquired property may have been specially in the minds of the Legislature when the Act was passed, but I am of opinion that it has used language which includes other kinds of property. I think that the words of the Act do prevent this second bill of sale from having any effect whether as regards chattels subsequently acquired or as regards the chattels which were comprised in the first bill of sale. In my opinion, the appeal fails for this reason.

FRY, L.J.:—

I am of the same opinion. The question as to the rights of the holders of the two bills of sale in this case turns on the construction of sects. 8 and 10 of the Act of 1878, and sect. 5 of the Act of 1882.

In the first place, it was said that the Plaintiff's bill of sale was not of the kind which required registration, not being given as security for a loan. I think this point is hardly arguable. I have no doubt that it was a bill of sale which required registration. Then it was said that the second bill of sale was a nullity and might be rejected as such. That argument is not maintainable, for the reason that the 10th section of the Act of 1878 gives priority to bills of sale, not according to the date of execution, but of the date of registration. Therefore, it is possible for a grantor who has assigned his property to give an interest to a grantee by means of the grantee getting prior registration; though he had no title himself he could create a title in the grantee. Therefore the second instrument is a subsisting bill of sale. But it is said that the section, as it deals with priorities, has no application to an absolute bill of sale. I cannot agree to that view. I think that every bill of sale, whether absolute or conditional, is included in the section. Therefore, an absolute bill of sale if unregistered is postponed to a subsequent registered bill of sale. So far, therefore, the Appellants are right.

But then we come to consider the effect of the 5th and 6th sections of the Act of 1882. [His Lordship read the two sections, and continued:—]

It seems plain that sect. 5 applies to every case in which a bill of sale but for this section would have had effect on property although the grantor was not at the time of execution the true owner of the property. One of such cases is where the grantor purports to convey property which is not his own at the time, but which he subsequently gets: then the conveyance operates by estoppel. Another case was where the owner having parted with all his interest at common law might nevertheless create an interest in a third person under the statute of 1878. Both these were cases in which before the Act of 1882 the grantor, though not the true owner, would be able to give an interest to the

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grantee. In my opinion, this section deals with both these cases; and there may be others also included in it. It was argued that the exceptions contained in sect. 6 shews that sect. 5 was intended to be confined to after-acquired property. I do not agree with that. That shews no doubt that after-acquired property is dealt with by the previous section, but it does not shew that it is the only thing dealt with. A proviso is not necessarily co-extensive with the enactment on which it is engrafted. It is sufficient if it qualify the enactment in whole or in part. I think, therefore, that as the grantor in the present case was not the true owner, the 5th section applies, and the second bill was void against every one except the grantor. It may be said that our decision in this case may affect the validity of a large number of bills of sale, and make it very difficult for any one to trust in the validity of any bill of sale. I foresee that it may have that effect, but I cannot alter the effect of the plain words of the statute.

LOPES, L.J.:—

I am sorry that I am not able to concur altogether with the conclusion at which the other Lords Justices have arrived. The question in the present case is a difficult one, and arises on the construction of two sections in the *Bills of Sale Acts* of 1878 and 1882. The first section is the 10th section of the Act of 1878. [His Lordship read the section.] I understand that to mean that where there are conflicting bills of sale, the date of registration is to determine their priority, and whether they are absolute or given as security for a loan, the date of registration will prevail. I think that applies to all bills of sale whatever within the definition of the Act of 1878. Then I come to the 5th section of the Act of 1882, as to the effect of which I differ from the other Lords Justices. [His Lordship read the section.] Applying that section to the present case, it is said that the grantor was at the date of its execution not the true owner of the chattels comprised in it, having absolutely granted them away by the former bill of sale, and, therefore, that the benefit of it is lost. I think the 5th section was meant to apply to after-acquired property of the grantor, and to that only, and was not intended to amend the

Act of 1878. This view appears to me to be confirmed by the terms of the 4th and 6th sections of the Act of 1882. As, however, the other Lords Justices are of a different opinion, the appeal must be dismissed.

Solicitors: *Foss & Ledsam; Prince & Ayres.*

M. W.

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June 5

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Company—Winding-up—Resolution—Voluntary Liquidation—Creditor—Action commenced before Winding-up Resolution—Supervision Order—Rights of Creditor—Judgment Debt—Priority—Pari passu—Staying Proceedings—Leave to continue Proceedings—Discretion of Court—Costs of Action—Adding Costs to Debt—Companies Act, 1862, *ss.* 87, 133, 163 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 231, 238].

Although sect. 163 of the *Companies Act*, 1862, making void all proceedings against a company in liquidation taken after the commencement of the winding-up, applies in terms only to cases in which the company is being wound up by the Court, or subject to the supervision of the Court, and not to the case of a voluntary winding-up, yet, having regard to the scheme of the Act, and especially to sect. 133, which enacts that, as a consequence of a voluntary winding-up, the property of the company shall be applied in satisfaction of its liabilities *pari passu*, a creditor who, before the resolution to wind up, has commenced an action against the company but does not obtain judgment until after the resolution, is not entitled to enforce his judgment so as to obtain priority over other creditors for his judgment debt and costs. and if, subsequently to the judgment, a supervision order is made, the Court may, in the exercise of its discretion under sect. 87, either stay further proceedings in the action or allow the plaintiff to continue them on terms.

Thus, where shortly after an action had been commenced in *Scotland* against an English company for damages for personal injuries to one of the company's workmen at their works in *Scotland*, the company passed a resolution to wind up voluntarily, and the Plaintiff in the action, though having notice of the resolution, proceeded with his action and obtained judgment for damages and costs, but before he was able to enforce his judgment by execution against the company's property in *Scotland*, an order was made in *England* continuing the winding-up under supervision, the Court allowed the Plaintiff to continue his proceedings under the judgment, but on the terms that he should have no priority over the other creditors in the winding-up; and that, so far as the proceedings in the action interfered with the winding-up, he should do all in his power to enable the liquidator to get in the company's assets in *Scotland*.

A creditor-plaintiff in an action against a company in voluntary liquidation is not entitled to any priority in the winding-up for his costs of the action: he can only add them to his debt.

THE *Thurso New Gas Company, Limited*, was registered in *England*, its registered office being at *Dewsbury, Yorkshire*, but it carried on its trading business at *Thurso*, in *Scotland*. In February, 1887, *Young*, one of the *employés* of the company, was

killed at their works at *Thurso*. In June, 1887, his widow and children commenced an action in *Scotland* against the company for damages. On the 22nd of August, 1887, the company passed a resolution for a voluntary winding-up, and appointed liquidators. On the 17th of October, 1887, the Plaintiffs in the Scotch action obtained letters of inhibition, equivalent to an injunction, to restrain the company from disposing of their real estate in *Scotland* to the prejudice of the Plaintiffs' claim in the action. On the 23rd of October, 1887, the liquidators served the Plaintiffs with notice of the resolution to wind up, but the Plaintiffs nevertheless went on with their action, and at the trial on the 24th of November, 1887, obtained a verdict for £850 damages. On the 20th of January, 1888, the verdict was enforced by judgment in the Scotch action. On the 20th of April, 1888, letters of arrestment, equivalent to a writ of attachment, were issued against the company's personal estate in *Scotland* to prevent the debtors of the company from paying their debts to the liquidators. On the 6th of June, 1888, a petition was presented for winding up the company, and on the 16th an order was made continuing the winding-up under the supervision of the Court. On the 20th of June, 1888, the Plaintiffs obtained an order in the action, equivalent to a judgment, for the costs of the action, amounting to £138 2*s.* 5*d.* Two summonses now came before the Court; one, dated the 21st of November, 1888, was by Mrs. *Young* and her children. It asked that it might be declared that by their inhibition and arrestment they had established the right to be ranked preferably on the assets of the company and to be treated as having a paramount charge upon the property and debts of the company arrested and attached, first, in respect of the judgment for £850, and, secondly, in respect of the £138 2*s.* 5*d.* costs; or, if necessary, that such costs might be declared to be costs incurred by the liquidators or the company after the winding-up, in the course of carrying on the business of the company, and payable in full out of the assets. The other summons was by the liquidators, and was dated the 1st of December, 1888. It asked that Mrs. *Young* and her children might be restrained from proceeding to enforce the inhibition and arrestment and from preventing them, the liquidators, from getting in the property

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and debts of the company in *Scotland*; also that Mrs. *Young* and her children might be ordered to do all necessary acts to enable the Applicants, as liquidators, to sell and get in the said property and debts.

The liquidators' summons was taken first.

Renshaw, Q.C., and *R. F. Norton*, for the liquidators:—

Having regard to sect. 163 of the *Companies Act*, 1862, as the voluntary winding-up commenced on the 22nd of August, 1887, that is, before the letters of inhibition and subsequent proceedings, all those proceedings were void. It is true that the section applies in terms only to cases in which a company "is being wound up by the Court, or subject to the supervision of the Court," but, though there is not any actual decision on the point, it seems that the joint effect of sects. 133, 138, 87 and 163, is to make the principle of sect. 163 applicable to the case of a voluntary winding-up: *Thomas* v. *Patent Lionite Company* (1); *Buckley* on the Companies Acts (2).

It is clear that the Court can in an English winding-up restrain proceedings in *Scotland*: *Buckley* on the Companies Acts (3).

[They were stopped by the Court.]

Marten, Q.C., and *Birrell*, for Mrs. *Young* and her children:—

There is no authority that sect. 163 applies to a voluntary winding-up; and we submit that the Act does not, in a voluntary winding-up, interfere with outside creditors, who may enforce their rights in any way they please until there is a supervision order or a winding-up by the Court. Therefore, we say that in this case anything done by us between the resolution to wind up and the supervision order is not affected by sect. 163. Under sect. 131 a company in voluntary liquidation continues its *status* until its affairs have been wound up, and is therefore capable of bringing or defending an action.

Here the liquidators having delayed applying to the Court, as possibly they might have done under sect. 138, to interfere to restrain the proceedings, until we had actually obtained the

(1) 17 Ch. D. 250. (2) 5th Ed. p. 374.
(3) 5th Ed. p. 239.

letters of inhibition and arrestment, they are, according to the practice of the Court, too late in now coming for an injunction, and should be prevented from interfering with our proceedings: *Parry's Case* (1); *In re Exhall Coal Mining Company* (2); *In re London Cotton Company* (3); *Rudow* v. *Great Britain Mutual Life Assurance Society* (4).

[KAY, J., referred to *In re Hull Forge Company* (5), where Lord *Romilly* refused to restrain an execution by a creditor of a company in an action brought after a resolution for a voluntary winding-up; and to *In re Sablonière Hotel Company* (6), where, in a similar case, Vice-Chancellor *Stuart* granted an injunction restraining the creditor from issuing execution.]

The former case went before the Court of Appeal, and, though the point argued and decided on appeal was only as to whether the liquidator was too late in his appeal, the Court did not express any dissent from Lord *Romilly's* decision.

Even if your Lordship is against us on the question of continuing our proceedings, we submit that our costs of the action, £138 2*s.* 5*d.*, should be paid in full out of the assets in priority to the general costs of the liquidation or of realisation: *Bailey & Leetham's Case* (7); *Ex parte Smith* (8); *In re Dominion of Canada Plumbago Company* (9).

KAY, J.:—

It seems to me that the only result the Court can come to upon the Act is simple and clear. The facts are these. [His Lordship stated them, and continued:—] I have now before me two summonses; one was taken out on the 21st of November, 1888, by the plaintiffs in the Scotch action, asking, in effect, for leave to proceed with the action, the necessity for the application arising from the provisions of sect. 163 of the *Companies Act*, 1862, which says that "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment,

(1) 4 D. J. & S. 63.
(2) Ibid. 377.
(3) Law Rep. 2 Eq. 53.
(4) 17 Ch. D. 600, 608.
(5) 36 L. J. (Ch.) 337.
(6) Law Rep. 3 Eq. 74.
(7) Ibid. 8 Eq. 94.
(8) Ibid. 3 Ch. 125.
(9) 27 Ch. D. 33.

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sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." Now, the commencement of the winding-up of this company was, as I have said, on the 22nd of August, 1887; therefore the letters of inhibition of the 17th of October, 1887, and the letters of arrestment of the 20th of April, 1888, if they are within the words of the section, are "void to all intents." But, notwithstanding that section, it has been held that, under sect. 87, the Court has power to give leave to continue proceedings which were pending at the commencement of the winding-up; and that is the reason why this summons was taken out by the Plaintiffs in the action.

Is it within the scheme of the Act that the Plaintiffs should be allowed to continue their proceedings? Of course, the object of the Plaintiffs in making this application is to get a priority over every other creditor of the company for their judgment debt and costs. Now, the Act says, in so many words, in sect. 133: "The following consequences shall ensue upon the voluntary winding-up of a company: (1) The property of the company shall be applied in satisfaction of its liabilities *pari passu*." If, therefore, the Court were, in the exercise of its discretion, simply to permit this action to proceed and execution to be levied, it would be giving to these creditors, the Plaintiffs, a priority over other creditors which sect. 133 says expressly shall not be given. It appears that no proceeding in the nature of execution was taken, no judgment was obtained, and no verdict was obtained against this company by the Plaintiffs, until after the actual commencement of the winding-up; therefore, *primâ facie*, the scheme of the Act makes it improper that these creditors should have priority. No doubt there are many circumstances which would induce the Court not to exercise its discretion by interfering with proceedings continued after the commencement of a winding-up; for instance, where there has been great delay or negligence on the part of the company in allowing the proceedings to go on, the Court might say it was unreasonable to stay the proceedings, and that it was too late to interfere: or where, in an action for debt, execution had been actually obtained, the Court would not, in the exercise of its discretion, interfere. This,

however, is not an action for debt, but for damages. The question whether any damages were payable, and, if so, to what amount, was eminently a question to be determined by a Court. Therefore it is quite proper that the action should go on; and if an application were made by the liquidators to stay the action, the Court would say, "No; it is proper that the action should be tried." But the question whether the Court would allow the creditors, the Plaintiffs in the action, priority for the fruits of their judgment would be another question. It seems to me that there is no reason why I should stay the action itself, which was a most proper and convenient mode of ascertaining whether damages should be obtained, and, if so, what. This is not a case in which I can say that any creditor of the company has been guilty of negligence in not applying to the Court to stay the proceedings. The supervision order, which was made on the 16th of June, 1888, made all proceedings subsequently taken absolutely void, subject only to the power of the Court, under sect. 87, to allow the proceedings to go on. There does not appear to me to be any sufficient reason to induce me to give the Plaintiffs priority over other creditors in the face of sect. 133, which says that, as a consequence of a voluntary winding-up, the property of the company shall be applied in payment of its liabilities *pari passu.*

Accordingly, I am of opinion that this is a case in which, in the exercise of the discretion given to the Court, I ought not to allow these creditors to obtain priority over the other creditors, or to disturb the imperative rule laid down by sect. 133.

Then it is said that, whatever the case may be as to the damages, the Plaintiffs are entitled to have their costs of the action paid in full. All the cases upon this point are referred to by Mr. *Buckley* in his work on the *Companies Acts* (1) where they are summed-up as follows: "The intention of the Act, where there is a resolution passed to wind up voluntarily, is (sect. 133) that all the creditors shall be paid *pari passu,* and the Court will therefore interfere by injunction to restrain one creditor from seizing an undue share of the assets for his own benefit. And if a creditor commence or proceed with an action for his debt after

(1) 5th Ed. p. 229.

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the winding-up commences, he can at most only add his costs to his debt." Then the authorities are stated in a note. That appears to me to be the rule I must follow in this case—namely, that the Plaintiffs must add the costs of the action to their debt.

One of the authorities cited to me on behalf of the Plaintiffs was *Parry's Case* (1), in which, not only was the action begun before the winding-up, but judgment was obtained in the action, execution was issued, and the sheriff went into possession and was about to sell, all before the presentation of the petition to wind up; and on those grounds it was held that the execution-creditor ought not to be deprived of the fruits of his execution, because, as it was said, the Court, in the exercise of its discretion, would take the state of circumstances into consideration.

In *Smith, Fleming & Co.'s Case* (2), Lord Justice *Turner* said, "The main purpose of the Act, as I understand it, is the collection and distribution of the assets of companies for the general benefit of their creditors, and amongst the creditors *pari passu;* and this discretion of the Court ought, therefore, as I think, to be exercised, not for the benefit of any particular creditor or creditors, but for the benefit of the general body of creditors interested under the Act."

The case which I find is nearest to the present is *In re Sablonière Hotel Company* (3), before Vice-Chancellor *Stuart,* where a resolution was passed for a voluntary winding-up, and was confirmed on the 28th of August, 1865, and on the same day a creditor commenced an action against the company to recover his debt, and obtained judgment. An application was made to restrain him from proceeding under that judgment. Vice-Chancellor *Stuart* said the "question is whether, having regard to the fact that this is only a voluntary winding-up, the Court will, in its discretion, interfere. By the 133rd section of the *Companies Act,* 1862, the Legislature declares that the effect of a resolution to wind up a company voluntarily shall be, that all the creditors shall be paid *pari passu.* Therefore, after the resolution is passed and confirmed, each of the creditors is entitled to a

(1) 4 D. J. & S. 63. (2) Law Rep. 1 Ch. 538, 545.
(3) Law Rep. 3 Eq. 74, 76.

proportionate share of the assets. But to allow one creditor to seize the whole, or an undue share, of the assets of the company for his own benefit, would be, in effect, to render nugatory the provisions of the statute. The execution must, therefore, be restrained." With every word of that I entirely agree; and that statement of the law has never been dissented from. It appears to me to express precisely what I understand to be the meaning of the statute; it confirms the opinion I form on the case now before me, and it is an authority which I very readily follow.

Then, with regard to the other summons—the summons by the liquidators to restrain the Plaintiffs from proceeding to enforce the inhibition and arrestment, and from preventing them, the liquidators, from getting in the property and debts of the company in *Scotland*—that comes within the 133rd section, and the liquidators are entitled to an injunction unless the Plaintiffs remove the obstacles they have imposed to the winding-up of the company. I think the proper course is to make one order on both summonses, that, so far as the orders and proceedings in the Scotch action do interfere with the winding-up, the Plaintiffs shall do all in their power to enable the liquidators to get in the assets of the company in *Scotland.*

With regard to the costs of these applications, the costs of the Plaintiffs are to be added to their debt, and the liquidators will take their costs out of the assets. The Plaintiffs will have liberty to prove in the winding-up for their debt and costs. The liquidators will, of course, have the carriage of the order.

Solicitors: *Keeping & Gloag; Ridsdale & Son.*

G. I. F. C.

KAY, J.

1889

July 11, 15.

WHITBY *v.* MITCHELL.

[1887 W. 2341.]

Perpetuity—Remoteness—Legal Limitations—Limitation to unborn Person for Life with Remainder to her Children born before particular Period—Restraint on Anticipation—Testamentary Power of Appointment given to unborn Person.

The rule applicable to legal limitations, that an estate cannot be limited to an unborn person for life followed by any estate to any child of such unborn person, is an absolute rule, independent of the rule against perpetuities whereby property cannot be tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of the period of an actually existing gestation.

By a marriage settlement lands were limited to the use of the husband and wife successively for life, with remainder to the use of their issue (born before any appointment made) as they should by deed appoint. They by deed appointed part of the lands to the use of their daughter for life for her separate use without power of anticipation, and after her decease to the use of such person or persons as she should by will appoint, and in default of appointment to the use of her children living at the date of that deed as tenants in common in fee:—

Held, that the only part of the appointment which was good was the gift to the daughter for life for her separate use.

By articles dated the 4th of November, 1821, made shortly before the marriage of *Charles Dennis* and *Mary Elizabeth Maddy*, it was agreed that upon the marriage a settlement should be made of certain lands to which *Charles Dennis* was entitled in fee simple.

By a settlement made in pursuance of the articles, and dated the 7th of May, 1840, the lands were conveyed to the trustees and their heirs to the use of *Charles Dennis* for life, with a limitation to trustees to support contingent remainders, with remainder to the use of *Mary Elizabeth Dennis* for her life, with a like limitation to support contingent remainders, with remainder after the decease of the survivor of *Charles* and *Mary Elizabeth Dennis*, "to the use of a child, grandchild, or more remote issue, or all and every or any one or more of the children, grandchildren, or more remote issue of the said *Charles Dennis* by the said *Mary Elizabeth* his wife, such child, grandchildren, or more

remote issue being born before any such appointment as hereinafter is mentioned shall be made to him, her, or them respectively, for such estate or estates, interest or interests, and in such parts, shares and proportions (if more than one), and with such limitations over, such limitations over being for the benefit of some or one of the objects of this present power, and in such manner and form, as the said *Charles Dennis* and *Mary Elizabeth* his wife" should by deed appoint, and in default of appointment, to the use of the child or children of *Charles* and *Mary Elizabeth Dennis* equally as tenants in common, and the heirs and assigns of the same child or children respectively, with a limitation over in case any of such children should die under twenty-one without leaving issue. The settlement contained the usual power of sale, and directions for investment of the proceeds in the purchase of land, and for interim investment thereof until a purchaser could be found.

Charles and *Mary Elizabeth Dennis* had only two children, viz., *Emily Hyde Dennis* (who afterwards married one *Burlton*) and another daughter.

By an indenture dated the 15th of March, 1865, *Charles* and *Mary Elizabeth Dennis* appointed that one moiety of the lands comprised in the indenture of the 7th of May, 1840, or the proceeds of sale thereof, should, after the decease of the survivor of them, go and remain to the use of *Emily Hyde Burlton* for life, for her sole and separate use, without power of anticipation, and after her decease, to the use of such person or persons as she should by will or codicil appoint, and in default of appointment to the use of the children of *Emily Hyde Burlton* living at the date of that indenture and their heirs equally as tenants in common, with a gift over in case all such children should die under twenty-one without leaving issue.

A similar appointment was also made by Mr. and Mrs. *Dennis* in favour of their other daughter, her children and appointees.

The power of sale contained in the settlement of 1840 was exercised, and a sum of £4700, part of the proceeds of sale, came into the hands of the Plaintiff and the Defendant *J. Turner*, as trustees, in respect of the moiety appointed by the above-stated indenture of 1865.

In December, 1877, the Plaintiff and *Turner*, as such trustees,

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lent the £4700 to the Defendant, *G. W. Mitchell*, upon the security of a bond and equitable mortgage.

Turner subsequently absconded.

In July, 1887, the Plaintiff brought this action against *Mitchell* and *Turner* to have an account of what was due upon the security of 1877, and to enforce the same by foreclosure or sale.

Mitchell, by his defence, alleged that he had paid to *Turner* three several sums of £1000, £1000, and £700, and that £2000 only remained due upon the security. The Plaintiff pleaded that such sums, if paid, were paid without his knowledge or authority, and *Mitchell* put in a counter-claim, to which he made the Plaintiff and *Turner*, *Emily Hyde Burlton*, and three of her five children who were living at the date of the indenture of the 15th of March, 1865, Defendants, alleging that by the request and with the authority of the Defendants to the counter-claim, the sum of £2700 repaid by *Mitchell*, was paid by *Turner* to the three children of *Emily Hyde Burlton*, or some or one of them, or duly applied by *Turner* in their maintenance, education and advancement, and claiming (*inter alia*) an inquiry whether the £2700, or any part thereof, had at such request or with such authority been so paid or expended.

Upon the action coming on for trial on the 11th of July, 1889, it appeared from correspondence which was given in evidence that payments had been made by *Mitchell*, on the repeated requests of *Emily Hyde Burlton*, with the view of the money being applied for the benefit of some of her children; and it was contended on his behalf that she was absolutely entitled to the £4700, and that therefore such payments were *pro tanto* a satisfaction of his debt. In order to determine whether or not *Emily Hyde Burlton* was so entitled it became necessary to consider the validity and effect of the deed of appointment of 1865, and as she and her children were not separately represented, and their interests in the matter were conflicting, the hearing was adjourned in order that she might be represented by separate counsel.

July 15. *W. F. Robinson*, Q.C., and *Alexander Young*, for the Plaintiff.

Renshaw, Q.C., and *Swinfen Eady*, for the Defendant *Mitchell*:—

The power of appointment by will given to *Emily Hyde Burlton* by the deed of 1865 was clearly void for remoteness, and the limitation in the same deed in default of such appointment is therefore likewise void: *Wollaston* v. *King* (1).

Farwell, for *Emily Hyde Burlton*:—

The appointment of 1865 was invalid so far as it restrained *Emily Hyde Burlton* from anticipation, and limited estates to her children, and she is absolutely entitled to the £4700. There are two branches of the law as to perpetuities; one under the familiar rule against perpetuities, whereby property cannot be tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of an actual period of gestation; the other, under the ancient rule of law applicable to legal remainders, that an estate cannot be given to an unborn person for life, followed by an estate to an unborn child of such person. The latter rule is applicable to the present case, because the limitations in the deed of appointment operate as if they were contained in the original settlement, which took effect as on the marriage of the parents. There has, no doubt, been some difference of opinion as to whether or not the two rules are separate and independent, but the balance of authority goes to shew that they are: Lord *St. Leonards* on Powers (2); *Fearne* on Contingent Remainders (3); *Williams* on Real Property (4), where the subject is fully considered. In *Cattlin* v. *Brown* (5), Lord *Hatherley* (then Sir *W. P. Wood*) said: "The rule is stated in the able argument of Mr. *Preston* in *Mogg* v. *Mogg* (6). He says, 'a gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of the time within which it is to take effect' (7). That is, I think, a perfectly accurate statement of the law which I am to apply to this case." But the

(1) Law Rep. 8 Eq. 165.
(2) 8th Ed. p. 393.
(3) 10th Ed. vol. i. p. 565.
(4) 9th Ed. pp. 263, 264; 16th Ed. pp. 314, 315.
(5) 11 Hare, 372, 375.
(6) 1 Mer. 654.
(7) Ibid. 664.

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learned Vice-Chancellor had not this question present to his mind, and he could not have intended in a mere *obiter dictum* to overrule the opinions of learned writers. In *Lewis* on Perpetuities (1) an attempt is made to make out that the two rules are in effect one and the same; but the grounds alleged are not satisfactory, and it is submitted the opinion expressed is not law, and is not consistent with the language of the Court in the cases of *Monypenny* v. *Dering* (2); *Cole* v. *Sewell* (3); *Hay* v. *Earl of Coventry* (4), and *Brudenell* v. *Elwes* (5); and see also *Preston* on Abstracts (6). It follows that the limitation in the deed of 1865 to the children of *Emily Hyde Burlton* is bad.

The restraint on anticipation by her is clearly bad under the rule against perpetuities: *Fry* v. *Capper* (7).

Marten, Q.C., and *W. Baker*, for the three children of *Emily Hyde Burlton*:—

The appointment made by the deed of 1865 in favour of the children of *Emily Hyde Burlton* is good. The rule referred to as to legal limitations has no application to estates taking effect under the *Statute of Uses*, or as springing or shifting uses. The deed of 1865 took effect in that way. The alleged rule is merely a particular instance of the rule against perpetuities, and Lord *St. Leonards* so treats it in his work on Powers (8), where, referring to a limitation to unborn children of an unborn tenant for life, he says that such a limitation is clearly void "by reason of its tendency to a perpetuity, independently of the technical objection of its being a possibility upon a possibility, which probably means the same thing;" and his observations in giving judgment in *Cole* v. *Sewell* (9) are to the like purport. If the limitation to the children in the deed of 1865 was not a springing or shifting use, it was a vested remainder to which the alleged rule clearly could not apply.

[KAY, J.:—When read into the original settlement, it was a contingent remainder.]

(1) Page 420.
(2) 7 Hare, 568; 2 D. M. & G. 145, 170.
(3) 4 D. & War. 1; 28.
(4) 3 T. R. 83, 86.
(5) 7 Ves. 382, 390.
(6) Vol. ii. p. 114.
(7) Kay, 163.
(8) 8th Ed. p. 393.
(9) 4 D. & War. 1, 32.

Moreover, that rule is applicable only where the limitation is to children of the unborn tenant for life born at any time. The unborn children cannot be excluded simply because they bear a particular relation to the tenant for life: the exclusion must be because they may be born at any time during his life. The rule, therefore, cannot apply where the limitation is to children born within a particular period not too remote. Here the appointment is confined to children born within such a period. It is clear that such an appointment is not obnoxious to the rule against perpetuities as ordinarily understood: *Routledge* v. *Dorril* (1); *Hockley* v. *Mawbey* (2); Lord *St. Leonards* on Powers (3).

The fact that the testamentary power of appointment conferred by the deed of 1865 was bad cannot affect the gift in default of appointment, for that gift is not subsequent, but alternative. In *Wollaston* v. *King* (4) this point did not arise.

[They referred also to *Evers* v. *Challis* (5); S.C. *nom. Doe* v. *Challis* (6); *Davidson's* Conveyancing (7); *Mogg* v. *Mogg* (8), and *Webb* v. *Sadler* (9).]

Renshaw, in reply.

KAY, J. (after stating the facts of the case, and observing that it was patent and was conceded that the settlement of 1840 must be treated for the purpose of all the questions raised as though it had been made before the marriage of *Charles* and *Mary Elizabeth Dennis*, continued as follows):—

The question has been raised whether these limitations in the deed of 1865 are good, or whether in point of fact the appointment is not entirely bad, except so far as it gives an estate for life to *Emily Hyde Burlton*. I confess that, if I am to decide the point, my opinion is very strong that the appointment is bad, except to the extent of the life estate to *Emily Hyde Burlton*.

(1) 2 Ves. 357, 366.
(2) 1 Ves. 143.
(3) 8th Ed. p. 397, s. 8.
(4) Law Rep. 8 Eq. 165.
(5) 7 H. L. C. 531.
(6) 18 Q. B. 224.
(7) 3rd Ed. vol. iii. p. 577.
(8) 1 Mer. 654, 664.
(9) Law Rep. 8 Ch. 419.

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This is really land, and the law as to land has always been that you cannot limit an estate to an unborn person for life, with remainder to the issue of that unborn person. Stated broadly, no one would dispute that proposition for a single moment; but it is said that if you do so limit, with a proviso that the unborn children of the unborn person who are to take shall be persons coming into existence within the period limited by the rule against perpetuities, that is good. All I can say is that no decision to that effect has been cited to me, and that I do not know of any. I do not know of any authority whatever for that limitation of the rule. The truth is, that under the old feudal law existing in *England*, which is only being broken down slowly by legislation and decisions of the Court, and which still exists to a very great extent, there has been a constant attempt on the part of owners of land to limit it in a most elaborate fashion in order to tie it up as long as possible, and that constant attempt has been constantly defeated both by legislation and the decisions of Courts of Law. One of the things attempted has been to make successive limitations of life interests to unborn persons and to the children of those unborn persons. That has always been treated as being an invalid limitation of real estate. You may limit for life to an unborn person, but you cannot limit it for life to the unborn person so as to tie it up until the death of that unborn person; that is to say, any remainder limited after that life estate must be to a person *in esse* at the time when it is made.

The only way to try the validity of the limitations in this deed of appointment is to read them into the original settlement. Suppose that a settlement were made in contemplation of the marriage of *A.* with *B.* limiting an estate to *A.* for life, remainder to *B.* for life, remainder to the first child of *A.* by *B.* for life, remainder to the children of that first child. That would *primâ facie* be utterly bad so far as the last limitation is concerned. Can you make it good by saying, "provided that such children shall be born within a life or lives now in being and twenty-one years afterwards"? I have asked in vain for any authority to that effect. If you could do that, then it is obvious that the course of limitation which I am now going to state would be perfectly

good. There might be a limitation to *A.* for life, remainder to an unborn child of *A.* for life, remainder to the unborn children of that unborn child for life, and so on, through a dozen or twenty or (if you pleased) a hundred successive limitations to unborn children of unborn children. If you could make the limitation which is here attempted good, you could also make a series of successive limitations of that kind good by merely inserting a proviso that the persons should come into existence within a life or lives in being, naming the lives, and twenty-one years afterwards. All I can say is that at present that mode of dealing with real estate is not sanctioned by the law of real property in this country; and I do not at all agree with the attempt which has been made to make out that the rule is only an application of the law against perpetuities. It is not only an application of the law against perpetuities; it is something more than that. It is the law of real property of this country which prevents elaborate limitations over of that kind. Whether they offend against the law of perpetuities, or are so ingeniously framed as not to offend against that law, I still hold it to be the law of this country that you cannot limit an estate to an unborn person for life with remainder to the children of that unborn person, for that such remainder is bad.

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For that proposition I do not want any higher authority than that of the late Mr. *Joshua Williams*, who was certainly one of the best real property lawyers that have existed in my lifetime. In his most valuable treatise on the Law of Real Property he discusses the whole subject. He refers to the foundation of the rule, the objection which the law had to "a possibility upon a possibility," and criticizes that, and then after that criticism he sums up the law thus (1): "But although the doctrine of Lord *Coke*, that there can be no possibility on a possibility, has ceased to govern the creation of contingent remainders, there is yet a rule by which these remainders are restrained within due bounds, and prevented from keeping the lands, which are subject to them, for too long a period beyond the reach of alienation. This rule is the second rule to which we have referred, and is as follows:—that an estate cannot be given to an unborn person for life,

(1) 9th Ed. pp. 263, 264; 16th Ed. pp. 314, 315.

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followed by any estate to any child of such unborn person; for in such a case the estate given to the child of the unborn person is void. This rule is apparently derived from the old doctrine which prohibited double possibilities." And then the learned author continues thus, in words which are very apt and well worthy of consideration: "It may not be sufficient to restrain every kind of settlement which ingenuity might suggest; but it is directly opposed to the great motive which usually induces attempts at a perpetuity, namely, the desire of keeping an estate in the same family; and it has accordingly been hitherto found sufficient. An attempt has been recently made, with much ability, to explain away this rule as merely an instance of the rule by which, as we shall hereafter see, executory interests are restrained." (See Lewis on Perpetuities (1)). "But this rule is more stringent than that which confines executory interests; and if there were no other restraint on the creation of contingent remainders than the rule by which executory interests are confined, landed property might in many cases be tied up for at least a generation further than is now possible."

That is the statement of Mr. *Williams'* opinion that if you might make successive limitations of this kind within the rule against perpetuities, you might tie property up for a generation longer than is now possible. He says that that is not the foundation of the rule, but that it is an absolute rule, independent of the rule against perpetuities. With that I entirely agree. I have always understood that to be so, and I do not think that any authority to the contrary could be found anywhere. Therefore, if it is necessary for me to decide the point, I must hold that this attempt to limit an estate to the unborn children of *Emily Hyde Burlton* is ineffectual; so also is the attempt to restrain *Emily Hyde Burlton* from anticipating the income of her share. That was decided in *Fry* v. *Capper* (2) by Lord *Hatherley*, who declined to tie up the life estate of an unborn person in that way, by an attempt to restrain that unborn person, if a married woman, from anticipation. Accordingly, it seems to me that the only part of this appointment which is good is the appointment to *Emily Hyde Burlton* for her life for her separate use.

(1) Page 408 *et seq.*

(2) Kay, 163.

Well, then, the defence of the mortgagor, *Mitchell*, is this. He says, "I have paid this money to *Turner*; I agree that the payment to *Turner* does not exonerate me, because *Turner* had no power to give me a complete receipt, but the money did reach, through the hands of *Turner*, the children of *Emily Hyde Burlton* by her direction, and it reached some of the children who were living at the time when this power was exercised, and to whom the appointment in remainder seems to have been made; but whether it reached them or not it certainly was applied by *Emily Hyde Burlton's* direction." That is his case. "Therefore," he says, "if *Emily Hyde Burlton* is absolutely entitled, the money has been paid, if not to her, to others by her direction." The counsel for *Emily Hyde Burlton* says, "True, but she did not know that she was absolutely entitled, and even if it was paid out of this money she supposed she was sanctioning advances to children who were entitled to advances," and wishes to raise a point of that kind. I am not at present in a position to decide a point of that kind. But I think it right to direct an inquiry, and all the more so because an application was made to me in Chambers to allow interrogatories to be exhibited to the children of *Emily Hyde Burlton*, that is, to three of them who were alive at the time of the exercise of this power and who were in *India*, and it seemed to me to be inconvenient to do so at that moment, because possibly the expense would not be required, and I directed that the application should stand to the trial of the action. *Mitchell* says, and says truly, that he has not had all the opportunities he is entitled to of shewing into whose hands this money did come, and accordingly, as I think he has made a *primâ facie* case of the application of the money for the benefit of some of the children of *Emily Hyde Burlton* not only by her authority, but at her repeated request, and under great pressure from her, as the correspondence shews, I think it right, at the risk of *Mitchell* as to costs, in case he fails, to direct an inquiry to bring out all the facts. Therefore it seems to me the inquiry had better be in some such terms as these, "an inquiry whether *Turner* applied any and what part of the £2700 paid to him by *Mitchell* in part of his mortgage debt of £4700 in payments to any and which of the children of *Emily Hyde Burlton*, and whether such payments

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or any and which of them were made with the consent of *Emily Hyde Burlton*, and whether he applied any and which of such moneys in making payments to *Emily Hyde Burlton* herself or to any other person or persons by her order or for her use, and under what circumstances."

Marten, Q.C., asked that the order should contain a declaration as to the effect of the deed of 1865, in order that it might appear clearly why the inquiry was directed.

KAY, J.:—

I have no objection to making a declaration that the appointment was invalid so far as it affected to restrain *Emily Hyde Burlton* from anticipation, and to give her a testamentary power of appointment, and to give the property in default of appointment to her children.

Solicitors: *Sanderson, Holland & Adkin; Cowdell & Son; W. Montgomery White.*

C. C. M. D.

KAY, J.
1889
July 26.

In re JOHNSON.
MANCHESTER AND LIVERPOOL BANKING COMPANY *v.* BEALES.

[1880 J. 0330.]

JOHNSON *v.* HOOLEY.

[1880 J. 993.]

Practice—Administration Action—Order in Chambers—"Further Consideration"—"Final Order"—Appeal—Time—Motion to Discharge—Rules of Supreme Court, 1883, *Order* LVIII. *r.* 15.

The time of one year, allowed by the Rules of the Supreme Court, 1883, Order LVIII. rule 15, for appealing to the Court of Appeal from a final order made in Court will not be extended, by analogy, to the case of a motion to discharge a final order made by the Chief Clerk in Chambers. Except by leave, no longer time will be allowed for moving to discharge an order made in Chambers that is a final order than for moving to discharge an order so made that is not a final order. If a longer time is required for moving to discharge a final order made in Chambers, application should be made to enlarge the time.

An order made in Chambers on "further consideration," in an administration action, leaving part of the fund to be dealt with thereafter and reserving liberty to apply, is not a "final order."

THIS was a motion in two administration actions to vary an order made by the Chief Clerk in Chambers, dated the 13th of July, 1888, but admittedly pronounced on the 10th of August, 1888, and passed and entered on the 13th of August, 1888. The order was substantially of the same nature as that in *In re Lewis* (1), but was expressed to be made upon "the second further consideration" of the actions. Liberty was reserved to all parties interested to apply in Chambers as to the payment of the legacies and annuities given by the testator in the first action, and as to the disposal of the balance, if any, remaining in Court after the payments directed by the schedules to the order, and also to apply generally.

In 1881 *Charles Johnson,* who was the Plaintiff in the second action and now had the conduct of the proceedings in both

(1) 31 Ch. D. 623.

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actions, mortgaged his beneficial interest in the estates which were being administered in the actions to *Arthur Price Llewellyn.* In 1884 *A. P. Llewellyn* obtained an order giving him leave to attend the proceedings in the actions, but at his own expense. By the above-mentioned order of the 13th of July, 1888, one set of costs was given to *Johnson* and his mortgagee, *Llewellyn,* and the object of the present motion was to disallow *Llewellyn's* costs on the ground that he had leave to attend at his own expense only.

The main question was, whether the motion, being virtually an appeal from the Chief Clerk's order in Chambers of the 13th of July, 1888, was in time, the notice of motion being dated the 6th of July, 1889, that is, within one year from the date on which the order was "pronounced."

Dunham, for the motion:—

As regards an order made by the Chief Clerk in Chambers, this Court is in the same position as the Court of Appeal, and on a motion to discharge such an order the rules as to the time for appealing to the Court of Appeal from orders made in Court apply by analogy. Now this order, being on further consideration, is a "final order:" *Cummins* v. *Herron* (1); and in that respect differs from the order in *In re Lewis* (2), which was not in terms an order on "further consideration," but only an interlocutory order. This, then, being a final order, this motion by way of appeal is in time, the notice of motion being dated within a year from the date when the order was "pronounced:" Rules of Supreme Court, 1883, Order LVIII. rule 15. In *In re Lewis,* the motion was held to be out of time, because the order in Chambers was interlocutory only, and not final, as in this case. Had it been a final order, it would seem from the judgment of the Master of the Rolls that the motion would have been held to be in time.

Marten, Q.C., and *A. D. Tyssen,* for *Llewellyn*:—

The application is out of time; it could only have been made within twenty-one days after the order was pronounced. This is

(1) 4 Ch. D. 787. (2) 31 Ch. D. 623.

not a final order, for it leaves a fund to be dealt with hereafter, just as in *In re Lewis* (1), and reserves liberty to apply. In *Cummins* v. *Herron* (2) the order was a final order, disposing of the whole action.

They were stopped by the Court.

KAY, J.:—

This is an application to discharge an order made in Chambers, and dated the 13th of July, 1888. The order, it seems, was not made by the Judge in person, but by the Chief Clerk; and the application is made under the 50th section of the *Judicature Act*, 1873, which is this: "Every order made by a Judge of the said High Court in Chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal."

Now the ground for the application is this: It is said that the order made was in the nature of a final order, because it was an order on further consideration made in the cause or matter; and the principal point on which the order is sought to be varied is that it contains the usual direction, where a mortgagor and his mortgagee are both parties to an administration action, that one set of costs only shall be allowed out of the estate in respect of their interest. I am told that the present Applicant was Plaintiff in one of the actions in which this order was made, and that, being one of the beneficiaries, he, before the date of the order of the 13th of July, 1888, mortgaged his interest to the mortgagee in question, whose name is *Arthur Price Llewellyn.*

A very important question indeed has been raised, namely, within what time must a person who considers himself aggrieved

(1) 31 Ch. D. 623. (2) 4 Ch. D. 787.

KAY, J.
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In re JOHNSON.
MANCHESTER AND LIVERPOOL BANKING COMPANY *v.* BEALES.
JOHNSON *v.* HOOLEY.

by an order of this kind move to discharge it? No authority has been adduced—I have never heard of any, nor have I ever heard the point raised before—for the proposition that has been urged, namely, that he has the same time which a person would have who appeals from a final order made in Court to the Court of Appeal. It is quite obvious that the same rules which relate to appeals to the Court of Appeal do not relate to motions to discharge orders made in Chambers; but the argument is that the Court will act by analogy, and give a party moving to discharge a final order made in Chambers the same time, that is to say, one year, as a person would have who wishes to appeal to the Court of Appeal from a final order made in Court. If this argument is well founded, the result would be this, that he would have a year within which to come to the Judge to move to discharge, and then another year within which to go to the Court of Appeal, and then, if he wished, he might go to the House of Lords. Unless the General Orders require it, I should be most reluctant to come to such a conclusion.

It is said I must do so, because, acting by analogy to the time given for appealing from an interlocutory order, the Court must give the same time to move to discharge an order made in Chambers—that is, acting by analogy, because no time is fixed by the section I have read or by the General Orders. Well, if that point came before me for decision for the first time, I should say that no longer time should be given to move to discharge a final order made in Chambers than should be given for appealing from an interlocutory order; because the Court has already power to enlarge the time for appealing from an order made in Chambers. In my opinion, the proper application to be made by a person desiring to appeal from a final order made in Chambers would be an application to enlarge the time. The view I take is that no longer time should be given to move to discharge a final order made in Chambers than would be given to move to discharge an order made in Chambers that was not a final order. But in any case, if a longer time is wanted for moving to discharge, an application must be made to enlarge the time.

But I am not satisfied that the point really arises here, because, although this is an order on further consideration made in

Chambers, it is not a final order in the true sense, for it does not wind up the matter, but leaves the question of the ultimate application of the balance of the fund to be dealt with hereafter, and gives liberty to apply to have that question determined. Therefore I am not sure that the point really arises; but the case is one in which, even if the point did arise, I should be most loth to extend the time for moving to discharge the order, or to give this Applicant any facility whatever. [His Lordship then stated the facts, and said the Applicant's objection that the order gave costs to his mortgagee, although the order giving his mortgagee leave to attend directed that he should do so at his own expense, should have been raised on the minutes of the order on further consideration. His Lordship then proceeded:—] To give a man a year to come to raise a point which he hesitated to raise on the minutes would be extravagant. In my opinion the application is out of time. As I have said, looking at the circumstances of the case, I should have been most loth to enlarge the time, and even if it had been enlarged, I should have refused to vary the order.

I therefore refuse this motion, with costs.

Solicitors for Applicant: *Burton & Stanley.*
Solicitors for Mortgagee: *H. Tyrrell & Son.*

G. I. F. C.

KAY, J.
1889
July 29

In re WALL.
POMEROY *v.* WILLWAY.

[1889 W. 773.]

Will—Construction—Gift to Charity—Persons not under Fifty Years of Age—"Aged" Persons within 43 Eliz. c. 4—"Deserving."

A testator directed that the interest of a fund should be for ever divided into annuities of £10 each, and be paid half-yearly "to an equal number of men and women not under fifty years of age, Unitarians, who attend *L. M.* Unitarian chapel or chapels in *B.*; a tablet to be placed in *L. M.* chapel to give the information of gift, otherwise how should the deserving know of it":—

Held, a good charitable gift for the benefit of "aged" persons, within 43 Eliz. c. 4.

ADJOURNED SUMMONS.

Thomas Phillipps Wall, who died on the 28th of April, 1888, by his will, dated the 4th of June, 1886, after making a pecuniary bequest, and desiring that certain moneys, including £500 to be received from the insurance of his wife's life at her death, should be invested in consols, continued as follows:—"This will make the sum to be put in consols £2500. Now I desire the interest of this £2500 absolutely and for ever to be divided into annuities of ten pounds each, and to be paid half-yearly to an equal number of men and women not under fifty years of age, Unitarians, and who attend *Lewin's Mead* Unitarian Chapel or chapels in *Bristol*; a tablet to be placed in *Lewin's Mead* Chapel to give the information of gift, otherwise how should the deserving know of it."

Upon an originating summons taken out by the executor to determine the construction of the will, the question was argued whether the above gift of £2500 was or was not charitable.

Christopher James, for the Executor.

Ingle Joyce, for the Attorney-General:—

This is a good charitable gift for deserving persons of a particular religious denomination who are not under fifty years of age, *i.e.*, are "aged" within the meaning of the statute 43 Eliz.

c. 4: *Attorney-General* v. *Comber* (1); *Collinson* v. *Pater* (2); *Thompson* v. *Corby* (3).

[He was stopped by the Court.]

O. L. Clare, for the widow of the testator:—

This is merely a gift for general objects of benevolence and liberality, and cannot be supported as a charitable gift: *Morice* v. *Bishop of Durham* (4). The word "deserving" is used by the testator only by way of reference to the earlier part of the gift. Persons over the age of fifty cannot be deemed "aged" within the meaning of the statute of *Elizabeth*. In *Attorney-General* v. *Comber* the gift was to widows and orphans, and orphans are expressly mentioned in the statute. In *Collinson* v. *Pater* there was no decision that the gift was charitable. In *Thompson* v. *Corby* the word "aged" was expressly used in the gift. In *In re Sutton* (5), *Pearson*, J., said that the word "deserving," standing alone, would be so vague that he did not know what meaning could be attached to it, as almost any object might be said to be a "deserving" object.

Ryland, for the next of kin of the testator, adopted the same arguments, and referred to *Kendall* v. *Granger* (6) and *Nash* v. *Morley* (7).

Ingle Joyce, in reply.

KAY, J.:—

I confess I think that this is a matter of some difficulty, but looking at the words of the statute, which expressly mentions "aged" people, I do not see how I can avoid the conclusion that this is a charitable gift.

No doubt it is perfectly well settled that mere benevolence is not charity. In order to constitute a benevolent gift also a charitable one, you must find that it contemplates some of the objects mentioned in the statute, or other analogous objects,

(1) 2 S. & S. 93.
(2) 2 Russ. & My. 344.
(3) 27 Beav. 649.
(4) 9 Ves. 399.
(5) 28 Ch. D. 464.
(6) 5 Beav. 300.
(7) 5 Beav. 177.

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1889
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which have, by a long series of decisions, been determined to be charitable. Now here the words are these:—[His Lordship referred to the terms of the gift of the £2500, and continued:—] So that it is a gift to persons not under fifty years of age, who are Unitarians, and attendants at *Lewin's Mead* Unitarian Chapel or chapels in *Bristol.* I confess I have the strongest possible reluctance to establish the gift, and it is because I had to struggle against that feeling that I heard the argument upon both sides. Here is a man who, on the face of his will, shews that he has a wife, but gives her nothing, and gives all he has practically in what he calls charity. If I had the power of legislation I would not allow such a will to take effect for a single moment, but I have not that power; I have nothing to do but to construe the will. I find in the statute of *Elizabeth* that one of the classes of persons who are objects of charitable gifts are "aged persons." Without straining language, I cannot say that where there is a gift to persons not under fifty years of age those persons are not "aged" within the statute. I think they are. I think there is enough in this will to indicate that the objects of the gift are aged persons, members of one or other of these congregations; and in dealing with such a trust I conceive the duty of the trustees would be to give the benefit of it to the deserving of the class, and although "deserving" would not of itself indicate that they were to be poor, yet when I couple all these facts together, that they are to be not under fifty years of age, deserving, members of a congregation of Unitarians, and that the annuities are only £10 each, I cannot help thinking that the true construction of these words must be that poor members of the congregation who have passed that age, and are less able to provide for themselves than they would be if they were younger, are intended to be benefited. I hold, therefore, that the gift is charitable, and good so far as the pure personalty of the testator is concerned. So far as relates to the impure personalty it will of course fail.

Solicitors: *Clarke, Woodcock & Ryland; Hare & Co.*, agents for *Solicitor to the Treasury; Meredith, Roberts & Mills*, agents for *Vassall, Parr, Osborne & Ward, Bristol.*

C. C. M. D.

In re UNION PLATE GLASS COMPANY.

KAY, J.
1889
Aug. 6.

Company—Reduction of Capital—Reducing Part only—Ultrà vires—Companies Acts, 1867 *and* 1877.

A limited company desiring to effect a reduction of capital under the *Companies Acts*, 1867 and 1877, has no power to do so by reducing some of its shares but not reducing others. Accordingly a petition for the sanction of the Court to a special resolution passed by a company for reduction of capital by reducing the amount of its ordinary shares while not reducing the amount of certain shares carrying a preferential dividend, was dismissed.

In re Barrow Hæmatite Steel Company (1), and *In re Quebrada Railway, Land and Copper Company* (2), not followed.

THIS was a petition by the *Union Plate Glass Company, Limited*, for the sanction of the Court to a special resolution for the reduction of its capital. The company was originally constituted as an unlimited company under a deed of settlement, dated in 1837. In February, 1864, it was registered as a limited company under the *Companies Act*, 1862, and by a resolution passed at a general meeting of the company, held in March, and confirmed in April, 1864, articles of association were adopted fixing the share capital and empowering the directors, with the sanction of a special resolution of the company previously given in general meeting, to increase its capital by the issue of preference shares not exceeding a certain amount.

In May, 1864, the company passed a special resolution authorizing the issue of new shares of £10 each, bearing a 6 per cent. dividend, payable out of the profits of the company upon the amount from time to time paid up, in preference and priority to dividends on the ordinary shares. In pursuance of that resolution, 3000 preference shares of £10 each were issued, and £1 per share was paid upon such shares.

By a special resolution, passed and confirmed in December, 1883, the articles were amended by stating that the capital of the company consisted of 5879 ordinary shares of £22 6*s*. each, fully

(1) 39 Ch. D. 582. (2) 40 Ch. D. 363.

KAY, J.
1889
In re UNION PLATE GLASS COMPANY.

paid, and 3000 shares of £10 each, with £1 paid, and bearing a fixed preferential dividend of 6 per cent.

On February 20, 1889, the company, in consequence of losses through depression in trade, passed a special resolution altering the articles of association by empowering the company by special resolution to reduce its capital by cancelling any lost capital, or any capital not represented by available assets, and to reduce the paid-up capital either with or without extinguishing any liability remaining on the company's shares. That resolution was confirmed at a general meeting held on the 19th of March, 1889, and immediately afterwards, on the same day, another general meeting was held, at which a resolution was passed reducing the amount of the ordinary shares to £20 each, fully paid, but leaving the 3000 preference shares of £10 each, with £1 paid up, unreduced. This resolution was confirmed at a general meeting held on the 5th of April, 1889. The notices to the shareholders convening these two meetings for passing the resolutions contained the following statement: "The effect of the above resolution will be to throw the loss, which it is proposed shall be written off, upon the ordinary shares to the relief of the preference shares." At both meetings the resolution was carried unanimously, there being present holders, to a large amount, of both ordinary shares and preference shares. The proposed reduction of capital did not involve either the diminution of liability on unpaid capital, or the return to any shareholder of any paid-up capital. The company then presented this petition under the *Companies Acts*, 1867 and 1877, asking that the special resolution for reduction and the reduction itself might be confirmed by the Court, and that the form of minute for registration carrying out the resolution might be approved.

The question was, whether a company desiring to make a reduction of capital can do so by reducing part only of its capital, leaving the rest untouched; or whether it is bound to reduce the whole of its capital equally or rateably.

E. S. Ford, for the company:—

I submit that, upon a reduction of capital under the *Companies Acts*, 1867 and 1877, it is not essential that the reduction should

be made equally or rateably on all the shares: *In re Barrow Hæmatite Steel Company* (1); *In re Quebrada Railway, Land and Copper Company* (2).

KAY, J.:—

This seems to me to be a complete misapplication of the *Companies Act*, 1867, the Act which contains provisions for enabling a company to reduce its capital.

Taking, first of all, the 9th section, it says this: "Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations, as originally framed or as altered by special resolution, as to reduce its capital." By "reducing its capital" the section means reducing the nominal amount of its capital. For instance, if a company has a nominal capital of £100,000, it may say, "Henceforward the capital, instead of £100,000, shall be £50,000."

Then sect. 10 requires the company, after the passing of a special resolution for reducing its capital, to add "and reduced" to its name for a limited period.

Then sect. 11 is this: "A company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction, and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit."

Then sects. 13 and 14 provide for the protection of creditors who object to the reduction. Sect. 15 directs the registration of the order of the Court confirming the reduction, and of a minute approved by the Court stating the capital as altered by the order. Sect. 16 provides for the minute forming part of the memorandum of association. Sect. 17 saves the rights of creditors who are ignorant of the proceedings. Sect. 18 directs that the

(1) 39 Ch. D. 582. (2) 40 Ch. D. 363.

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minute when registered shall be embodied in every subsequent copy of the memorandum; and sect. 19 imposes a penalty on concealment of the name of any creditor.

Now, I cannot find the smallest intimation that the Act gives a company power to reduce certain of its shares without reducing the others; and I do not know what the power which the company has in general meeting can possibly have to do with the matter. There is no power given by this Act to the company in general meeting to say, "We will reduce the shares of *A.*, *B.*, and *C.*, and no other shares." In my opinion any reduction of that kind is completely beyond the powers of the company. How could any company in general meeting, having only a general power to reduce capital, say, as in this case, "We agree that the capital of all the ordinary shareholders shall be reduced, but the capital of the shareholders who are entitled to preferential dividends"—a right which, it is to be observed, gives them no preference as to capital in any kind of way—"shall not be reduced." I do not know how a majority could bind a dissentient individual by a resolution of that kind: in my opinion it could not. I am distinctly of opinion that such a resolution as that would be beyond the powers of the company. But if it were not, to expect the Court to sanction a resolution of that kind, which is, in fact, the resolution that has been passed in this case, namely, that all the ordinary shareholders' capital is to be reduced, but that the shares of those who are entitled to a preferential dividend shall not be reduced, is quite out of the question. Certain cases have been referred to in which another Judge appears to have taken a different view of the matter; but my own view is that which I have expressed, and without the authority of a Court of Appeal, I should never venture to sanction a resolution of this kind.

The petition must, therefore, be dismissed.

Solicitors: *Byrne & Blakiston.*

G. I. F. C.

In re WATERS.
WATERS *v.* BOXER.

[1889 W. 1651.]

KAY, J.
1889
Aug. 7.

Will—Real Estate—Trust for Sale after Death of Tenant for Life—Legacy payable out of Proceeds of Sale—Interest, from what Time payable.

A testator devised his real estate to his wife for life, and after her death to trustees in trust for sale, and out of the proceeds to retain a sum of £1000 to be held upon the trusts after declared: the residue of the proceeds to be divided into four equal shares, of which one was to be invested and held in trust for his daughter *M.* for life, with remainder to her children; and similar trusts were declared of the other three shares in favour of his three other daughters and their children. And he declared that the £1000, together with interest at 4 per cent. to the date of retainer, should be held upon the trusts declared of the said one-fourth share in favour of *M.* and her children. And he empowered his trustees to postpone the sale of his real estate for three years after the death of his wife, and declared that the rents of the unsold real estate should be applied as the income of the proceeds of sale would be applied if the premises had been sold and the proceeds invested.

The testator's widow survived him, and died. The trustees proposing to sell the real estate about two years and a half after her death, and to retain the £1000 out of the proceeds as directed by the will, the question arose whether, until such retainer, the £1000 carried interest at 4 per cent. from the death of the widow, or only from the expiration of one year afterwards:—

Held, that the £1000 carried interest at 4 per cent. from the death of the widow. .

Turner v. *Buck* (1) considered.

ADJOURNED SUMMONS.

Azariah Waters, by his will, dated the 7th of March, 1882, after appointing his wife executrix, bequeathed to her absolutely all his personal estate, she paying thereout his debts and funeral and testamentary expenses. And he devised all his real estate to his said wife during her life; and from and immediately after her decease he devised such of his real estate as was of freehold, and not of copyhold tenure, to the use of two trustees, their heirs and assigns, upon trust for sale. And he empowered and directed his trustees, after the decease of his said wife, to sell such of the

(1) Law Rep. 18 Eq. 301.

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said real estate as was of copyhold tenure. And the testator declared that his trustees should stand possessed of the net moneys arising from the sale of his said freehold and copyhold hereditaments upon trust "to retain thereout two several sums of £1000 each, with interest thereon respectively at the rate and from the respective dates hereinafter mentioned, and stand possessed of such two several sums and interest respectively upon such trusts as are hereinafter expressed and declared of and concerning the same respectively." And the testator directed his trustees to divide the trust funds which should remain after retaining such sums and interest (which remaining trust funds were thereinafter referred to as "my said residuary estate") into four equal shares. And he declared that the trustees should stand possessed of one of such fourth shares upon trust to invest the same and to pay the income to a married daughter, *Mary Anne Browne*, for her life, and after her death to stand possessed of such share and investments and the income thereof in trust for her children equally at twenty-one or marriage. And the testator declared similar trusts of another fourth in favour of his daughter Mrs. *Taylor*, and the other two fourths were settled upon another daughter and upon the children of a deceased daughter. "And as to the two several sums of £1000 each, and the interest thereof respectively, hereinbefore directed to be retained by my trustees out of the net moneys to arise from the sale of my said freehold and copyhold hereditaments, I declare that one of such two sums of £1000 each, together with simple interest thereon calculated at the rate of £4 per centum per annum from the 4th day of May, 1876, up to the date of such retainer as aforesaid, shall be held by my trustees upon such trusts in favour of my said daughter *Mary Anne Browne* and her child or children, and otherwise, as shall correspond with the trusts hereinbefore declared concerning the one equal fourth share of my said residuary estate hereinbefore directed to be held by my trustees upon trusts in favour of my same daughter and her child or children, or otherwise." And the testator declared similar trusts of the other £1000 in favour of Mrs. *Taylor* and her children, except that interest was to be calculated from the 25th of July, 1872, up to the date of retainer. And he

declared that "it shall be lawful for my trustees to defer and postpone the sale of the whole or any part or parts of my said real estate so long after the decease of my said wife as to my trustees shall seem proper, but not exceeding the term of three years." And he declared "that the net rents and profits of such of my said real estates as shall not for the time being have been sold shall be paid and applied as the annual income of the proceeds of sale thereof would be applied if the same premises had been actually sold and the proceeds of sale invested under the trusts and powers in that behalf hereinbefore contained."

The testator died on the 16th of February, 1885, and his widow died on the 12th of December, 1887.

In the exercise of the discretion given him by the will, the acting trustee of the will (the other trustee had disclaimed) had postponed the sale of the testator's real estate, but it was his intention to offer it for sale in the summer of next year, that is, about two years and a half after the widow's death.

This originating summons was taken out by the trustee against the residuary legatees, including Mrs. *Browne* and Mrs. *Taylor*, to have it determined whether the two legacies of £1000 each, and the capitalized interest thereon from the respective dates mentioned in the will to the death of the widow, carried interest, until retainer, at 4 per cent. per annum, payable out of the rents of the real estate, from the death of the widow, or only from the expiration of one year after her death.

Martelli, for the Plaintiff.

Christopher James, for the Defendants, Mrs. *Browne* and Mrs. *Taylor*, submitted that interest on the legacies was payable from the death of the tenant for life.

Dunning, for the Defendants, the residuary legatees other than Mrs. *Browne* and Mrs. *Taylor*:—

One year from the death of the tenant for life should be given to the trustees to realize the estate, and therefore interest should be allowed on the legacies only from the expiration of that year; just as, in the case of an immediate devise in trust for sale,

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interest on legacies charged on the proceeds of sale is not payable until after a year from the testator's death: *Turner* v. *Buck* (1).

KAY, J.:—

In my opinion the interest runs from the death of the tenant for life. This is a charge on the real estate. The legacies are given in this way. The testator directs that after the death of the tenant for life the trustees shall sell the real estate and retain out of the net proceeds two sums of £1000 each. This is a primary charge. The residue of the proceeds is to be dealt with as residuary estate. These legacies are a primary charge on the proceeds of sale. Why they are not a charge on the real estate I cannot imagine. Then the testator says that these sums of £1000 are to be dealt with as he afterwards declares; and he afterwards declares that one of these two sums shall be held upon such trusts in favour of his daughter, Mrs. *Browne*, and her children as shall correspond with the trusts thereinbefore declared concerning the one-fourth of the residue directed to be held upon trusts in favour of his said daughter and her children, which trusts were, shortly, for Mrs. *Browne* for life, with remainder to her children. Then he gives power to his trustees to postpone the sale of his real estate, and says that "the net rents and profits of such of my said real estates as shall not for the time being have been sold shall be paid and applied as the annual income of the proceeds of sale thereof would be applied if the same premises had been actually sold and the proceeds of sale invested under the trusts and powers in that behalf hereinbefore contained." No doubt his meaning was that, from the time when these legacies became payable, that is to say, the death of the tenant for life, the time when they became an actual charge on the real estate, and were therefore raiseable out of it, the rents of the real estate were to be applied as if the two legacies had been raised and invested and the income of them payable to the tenants for life.

A case was cited, *Turner* v. *Buck*, in which real estate was

(1) Law Rep. 18 Eq. 301.

devised in trust for sale immediately on the death of the testator, and out of the proceeds to pay certain legacies; and the learned Judge who decided that particular case applied the rule as to personal estate, and held that one year from the death of the testator must be allowed to the trustees to give them time to realize, and that no interest was payable on the legacies for that year. It is now attempted to apply that decision—which is, so far as I know, a unique decision—to the present case, where the direction is to sell, not at the death of the testator, but after the death of the tenant for life, and it is said that a year ought to be given to realize the estate, and that interest on the legacies is not payable until the expiration of that year. In my opinion that is quite wrong. These two sums are, in my opinion, a primary charge on the real estate. There is a power for the trustees to postpone the sale of the real estate, and a direction that until sale the income shall be applied in the same manner as the income of the proceeds of sale. That is a distinct direction that the interest on these legacies shall be paid out of the rents of the real estate.

In my opinion, therefore, interest on these sums is payable at 4 per cent. from the death of the tenant for life.

Solicitors: *C. F. Martelli*, agents for *Burton & Son, Yarmouth; Whites & Co.; Wilson, Bristows, & Carpmael.*

G. I. F. C.

KAY, J.
1889
Aug. 8.

In re SKEATS' SETTLEMENT.
SKEATS *v.* EVANS.

[1889 S. 2744.]

Trustee—Settlement—Construction—Power to appoint new Trustees—"Other" Person or Persons—Donee of Power appointing himself, Appointment held invalid.

By a marriage settlement property belonging to the wife was settled on trusts in favour of the wife, her children, appointees, and next of kin, and if any trustee should die, or go to reside abroad, or desire to retire from, or refuse or become incapable to act in, the trusts, the husband and wife, or the survivor, and after the decease of such survivor, the continuing trustees or trustee, or, if no continuing trustee, the retiring or refusing trustees or trustee, or the executors or administrators of the last acting trustee, were empowered to appoint any "other" person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act. The husband and wife, in exercise of the power, purported to appoint the husband and another person to be trustees in the place of retiring trustees. Upon a summons raising the question whether the retiring trustees might transfer the trust property to the persons so appointed:—

Held, that a power of appointing new trustees being fiduciary, the donee of such a power cannot appoint himself:

Held, also, that the terms of the power required that the trustee or trustees to be appointed should be some person or persons "other" than the person or persons making the appointment:

Held, therefore, upon both these grounds, that the appointment was invalid.

ADJOURNED SUMMONS.

By the settlement, dated the 8th of August, 1882, made on the marriage of the Defendant *Joseph Skeats* and the Plaintiff *Mary Cecilia Skeats*, property and funds belonging to the wife were settled upon trust for her for life, but during coverture for her separate use, without power of anticipation, and after her death for the children of the marriage who, being sons, should attain twenty-one, or being daughters, should attain that age or marry; and if there should be no child of the marriage, in trust for such person or persons as the wife should by deed or will appoint, and in default of such appointment upon trust for the person or persons who, under the statutes for the distribution of intestates'

effects, would have been entitled thereto if the wife had died possessed thereof intestate and without having been married; and it was declared that, if and so often as any of the trustees thereby appointed or any future trustee or trustees should die or go to reside abroad, or should desire to retire from, or refuse or become incapable to act in the trusts, it should be lawful for Mr. and Mrs. *Skeats* during their joint lives, and for the survivor of them during his or her life, and after the decease of such survivor for the continuing trustees or trustee for the time being, or if there should be no continuing trustee, then for the retiring or refusing trustees or trustee, or the executors or administrators of the last acting trustee, "to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act as aforesaid," and that upon every such appointment the trust property should be so assured and transferred as to become vested in the new trustee or trustees, either jointly with the continuing trustees or trustee, or solely as the case might require, and every such new trustee (as well before as after the trust premises should have become vested in him) should have all the powers and authorities of the trustee in whose place he should be substituted.

The settlement contained no provision for the remuneration of trustees thereof.

The Defendants *Edmund Evans* and *William Bennett*, existing trustees of the settlement, were desirous of retiring; and by an indenture dated the 15th of July, 1889, and made between *Joseph Skeats* and Mrs. *Skeats* of the first part, *Evans* and *Bennett* of the second part, and *Joseph Skeats* and the Defendant *Dan Drew* of the third part, *Joseph Skeats* and Mrs. *Skeats* in exercise of the power contained in the settlement purported to appoint *Joseph Skeats* and *Dan Drew* to be trustees of the settlement in the place of *Evans* and *Bennett*.

Evans and *Bennett*, being doubtful whether the deed of 1889 was a valid exercise of the power, were unwilling to transfer the property and funds vested in them, which were subject to the trusts of the settlement, to *Skeats* and *Drew* without the sanction of the Court; and this summons was accordingly taken out to

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have it determined whether the deed was a valid exercise of the power, and whether *Evans* and *Bennett* might transfer the settled property and funds to *Skeats* and *Drew*.

G. E. Cruickshank, for the Plaintiff and the Defendants *Skeats* and *Drew*:—

The power of appointing new trustees was validly exercised by the deed of 1889. The validity of the appointment is questioned on two grounds: (1) that it is not competent to the donee of such a power to appoint himself, and (2) that, by force of the word "other," the terms of the present power preclude such an appointment. The first point is treated in *Lewin* on Trusts (1) as an open one, though the learned author says that "as no one can be judge in his own case, such an appointment would be open to objection;" and in *Tempest* v. *Lord Camoys* (2), Mr. Justice *Chitty* deals with the question as not being covered by authority. In *Forster* v. *Abraham* (3) a power to appoint new trustees, vested in the trustees with the consent of the tenant for life, was exercised by appointing two successive tenants for life, and the title of the survivor so appointed was held good, although it was intimated by Sir *George Jessel*, M.R., that it was doubtful whether the Court would have made such an appointment. Cases like *In re Tempest* (4)—referred to in *Forster* v. *Abraham*—where the Court is asked to make an appointment, rest on a different footing. Here the appointment is complete, and the question is not one of the discretion of the Court, but of the validity of an appointment which, it is submitted, is in accordance with the terms of the power. It is clear that the appointment of a beneficiary to be trustee is not invalid; and as the trustees under this settlement are not remunerated, there can be no such conflict between duty and interest on the part of the donee of the power as will vitiate the appointment.

Upon the second point it is submitted that the word "other," according to the natural construction of the context, refers to some person other than the trustee who is dead, or has gone to reside abroad, or desires to retire from, or refuses, or becomes

(1) 8th Ed. p. 666.
(2) 58 L. T. (N.S.) 221.
(3) Law Rep. 17 Eq. 351.
(4) Ibid. 1 Ch. 485.

incapable to act in, the trusts of the settlement. The terms of the power are substantially identical with those of sect. 27 of *Lord Cranworth's Act* (23 & 24 Vict. c. 145), yet in no text-book has it been suggested that that section precludes such an appointment as that now in question.

[He also referred to the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), ss. 31, 34.]

Upjohn, for the Defendants *Evans* and *Bennett*:—

It is submitted, on both the grounds which have been mentioned, that the deed of 1889 was an invalid exercise of this power. A power to appoint new trustees is a power of a fiduciary character. In *Sugden* v. *Crossland* (1) a trustee of a will retired in consideration of £75 paid to him by a person whom he appointed to be trustee in his room, and the Court directed the new trustee to be removed, declared the appointment void, and held that the £75 formed part of the assets. *Raikes* v. *Raikes* (2) involves the proposition that a tenant for life exercising such a power is a trustee of the power. In *Webb* v. *Earl of Shaftesbury* (3), where there was a power to one *Arrowsmith* to appoint a new trustee, with authority to charge commission, Lord *Eldon* said (4), "It is true, he can, by the appointment of a trustee, convey a much more extensive interest than a trustee appointing a new one in general cases can. But that circumstance does not at all affect the control of the Court over his discretion; though it imposes upon the Court a duty more especially to take care, that its own discretion is wisely exercised; for, when such a remuneration is given to the new trustee as Mr. *Arrowsmith* can give, no one motive ought to operate upon him in the appointment, but to do the very best thing, not for himself, or the person whom he is to appoint, but for those whose interests they are to take care of." It is well settled that the costs of appointing new trustees come out of the *corpus* of the estate, which would not be the case if the tenant for life might exercise the power for his own benefit.

Upon the second point, it is submitted that the word "other" must be read as excluding the person or persons making the

(1) 3 Sm. & Giff. 192.
(2) 32 Beav. 403.
(3) 7 Ves. 480.
(4) Ibid. 487.

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appointment. The more restricted construction contended for would make the word either superfluous or senseless.

Cruickshank, in reply.

KAY, J.:—

No case has been cited in which a person having a power of appointing new trustees has appointed himself, and the appointment has been held to be valid by a Court of Justice. The question whether such an appointment is valid or not depends, I think, as has been said in argument, very much upon whether the power is to be treated as a fiduciary power or not. Now I take that question first. The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose. Is that power of selection a fiduciary power or not? I will try it in this way, which I offered as a test in the course of the argument. Suppose, as happens not unfrequently, that trustees, under the terms of the deed of trust, are entitled to remuneration by way of annual salary or payment. Could the person who has the power of appointment put the office of trustee up for sale, and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is that he cannot exercise the power for his own benefit. Why not again? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is a fiduciary power. The case cited before Lord *Eldon* seems expressly to confirm that view. Lord *Eldon* did treat it as a power in the exercise of which the appointor had a fiduciary duty to perform, which he could not exercise in any way for his own benefit, and in exercising which he was bound to do the best in the interests of the *cestuis que trust* whose trustee he was appointed. I there-

fore come without any hesitation to the conclusion that this power is of a fiduciary nature. Now what is the rule, the universal rule, observed in Courts of Justice as to a duty of that kind? The universal rule is that a man should not be judge in his own case; that he should not decide that he is the best possible person, and say that he ought to be the trustee. Naturally no human being can be imagined who would not have some bias one way or the other as to his own personal fitness, and to appoint himself among other people, or excluding them to appoint himself, would certainly be an improper exercise of any power of selection of a fiduciary character such as this is. In my opinion it would be extremely improper for a person who has a power to appoint or select new trustees to appoint or select himself, for that principal reason. Has, then, the practice of such a person appointing himself been sanctioned by conveyancers or the profession in general? The answer must be, certainly not. Such appointments, if they ever take place, are the rarest in the world. In all my long experience I have seldom come across such a case, if at all. And then it must be remembered that such a power is generally or most often given to the tenant for life under the settlement. If the power does admit of the appointment of the appointor, there cannot be an exception when it is given to the tenant for life. The tenant for life might appoint himself, and you could not say that that is not a proper exercise of the power, because he is tenant for life, and therefore the appointment is bad. The fact that the power of appointment is generally given to the tenant for life is another reason for saying that it is obvious that powers of this kind do not contemplate that the appointor would appoint himself, and therefore, if this question is untouched by authority —and it seems to me, so far as cases have been mentioned, to be practically untouched by authority—I come to the conclusion that this is a power of a fiduciary character, and consequently that the man who exercises it is exercising a duty of a fiduciary nature to the *cestuis que trust* under the settlement, and therefore he cannot exercise it by appointing himself. If a decision be wanted on the point, I am prepared to hold that such appointment is bad.

I think there is more in this case, but I rather dealt by

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preference with the general question first. In this case the power is worded, as I believe these powers commonly are, thus:—[His Lordship read the terms of the power.] Now the question is what is the meaning of the word "other." Does it mean other than the trustee who is dead? If it does, it is admitted the word is superfluous. Does it mean other than the trustee who is retiring? There again it is quite superfluous, because the retiring trustee would not be appointed; it would not be necessary or possible that he should be appointed. Does it mean other than the trustee residing abroad or becoming incapable? It would have some meaning in those cases, no doubt; a better meaning than if you apply it only to the trustee who is dead or who desires to retire. But why should it not mean other than the person making the appointment as well? I observe that the person making the appointment may be the continuing trustee. The continuing trustee may appoint "any other person or persons to be a trustee or trustees" &c. In that case "other" must mean some other person than the trustee deceased, or going abroad, or retiring, or refusing, or becoming incapable to act, and also other than the trustee making the appointment, that is to say, other than the appointor himself. Or if continuing trustee only refers to the case of a trustee being dead, still "other" must mean other than the continuing trustee himself. He cannot possibly appoint himself. Well, then, take the case of the executors or administrators of the last acting trustee. Can this mean that the executors or administrators of the last acting trustee, who are to appoint any other person or persons to be trustee or trustees, may appoint themselves? The more natural meaning to give to the word "other" is to say that it must be other than the trustee to be replaced, and the person who is replacing him by making the appointment. I have no desire to decide the case simply on this narrow ground, and therefore I have taken the broader question first; but if there be a doubt, or difficulty, or any ambiguity as to whether the word "other" is meant to exclude the appointor as well as the retiring or deceased or other trustee, I am of opinion that the proper mode of construing the word is to say that it does mean to exclude the appointor, because the general practice of conveyancers, the understanding of lawyers, and the purposes of

deeds like this are against the notion of a person appointing himself. Therefore if the language is in the least degree ambiguous I should give the word "other" the meaning I have attributed to it of excluding the appointor as well as the other persons indicated. For both reasons I think the appointment is bad, but I say again, if I had to decide on the first ground alone, I should equally hold this appointment to be bad.

Solicitors: *Schultz & Son*, agents for *Gwilym & Charles James, Merthyr Tydfil.*

C. C. M. D.

CLARKE *v.* HAYNE.

KAY, J.
1889
June 21, 29.

[1888 C. 4527.]

Settlement—Construction—Trust for Wife's Next of Kin—Husband surviving Wife—Time for ascertaining Next of Kin.

By a marriage settlement, dated in 1839, certain property of the wife was vested in trustees upon trust for the appointees of the wife, and, in default, for her for life for her separate use, and after her death for the husband for life, and, after the decease of the husband and wife, in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto in case the wife having survived the husband were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes.

The wife died in the lifetime of the husband. Her next of kin under the statute at her death and those persons who would have been her next of kin if she had survived her husband and died immediately after his death were not altogether the same, and the question was which of those two classes was to take:—

Held, that the persons to take were those who would have been entitled to the wife's personal estate if she had survived her husband and died intestate immediately after him.

Druitt v. *Seaward* (1), and *Re Bradley* (2), not followed.

ADJOURNED SUMMONS.

By an indenture dated the 23rd of October, 1839, and made between *Richard Beach* of the first part, *Martha Robinson*, widow,

(1) 31 Ch. D. 234. (2) 58 L. T. (N.S.) 631.

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of the second part, and *Henry Hayne* and *George Hayne* of the third part (being the settlement executed prior to the marriage of *Richard Beach* and *Martha Robinson*), certain copyhold hereditaments and personal estate belonging to the said *Martha Robinson* were vested in the said *H. Hayne* and *G. Hayne* in trust, after the marriage, for such persons as the said *M. Robinson* should appoint; and in default of appointment, upon trust for the said *M. Robinson* during her life for her separate use, and after her death for the said *R. Beach* during his life, and after the death of both of them, "in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case the said *M. Robinson* having survived the said *R. Beach* were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes."

Martha Beach died on the 21st of November, 1848, without having exercised her power of appointment.

Richard Beach died on the 3rd of October, 1887, whereupon the property comprised in the statement became divisible under the trusts for the next of kin of *Martha Beach*.

The next of kin of *Martha Beach* under the statutes at her death, and those persons who would have been her next of kin if she had survived her husband and died immediately after his death, were not altogether the same, and the question arose which of those two classes was to take.

This was an originating summons taken out by the Plaintiff, one of the next of kin of *Martha Beach*, against the executor of the surviving trustee of the settlement, to ascertain who were the persons now entitled to the settled property.

John Forby was appointed to represent, for the purposes of the action, such of the next of kin of *Martha Beach* as were living at the time of her death but predeceased *Richard Beach*.

Dundas Gardiner, for the Plaintiff, contended that the class to take were the next of kin of *Martha Beach* who survived *Richard Beach*. He cited *Pinder* v. *Pinder* (1); *Chalmers* v.

(1) 28 Beav. 44.

North (1); *Wharton* v. *Barker* (2); *Downes* v. *Bullock* (3); *Wheeler* v. *Addams* (4); *Druitt* v. *Seaward* (5).

[KAY, J., referred to *White* v. *Springett* (6).]

W. F. Hamilton, for *John Forby*, contended that the class to take included the next of kin who were living at the death of *Martha Beach* but predeceased *Richard Beach*, and cited *Mortimore* v. *Mortimore* (7).

E. Clayton, for the Defendant, cited *Re Bradley* (8).

Dundas Gardiner, in reply.

1889. June 29. KAY, J.:—

By a marriage settlement dated the 23rd of October, 1839, certain property was vested in trustees, upon trust for the appointees of the wife, and in default, for her for life for her separate use, and after her death for the intended husband for life, and after the decease of the husband and the wife, "in trust for the person or persons who under the statutes made for the distribution of the estates of intestates would then be entitled thereto in case the wife, having survived the husband, were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes."

The wife died in the lifetime of the husband. Her next of kin under the statutes at her death, and those persons who would be her next of kin if she had survived her husband and died immediately after his death, are not altogether the same; and the question is which of these two classes is to take.

It is to be observed that in this case there is no provision for children of the marriage. The ultimate gift is to take effect whether the wife survives the husband, or not. The argument on behalf of what has been called the artificial class, namely,

(1) 28 Beav. 175.
(2) 4 K. & J. 483.
(3) 25 Beav. 54; 9 H. L. C. 1.
(4) 17 Beav. 417.
(5) 31 Ch. D. 234.
(6) Law Rep. 4 Ch. 300.
(7) 4 App. Cas. 448.
(8) 58 L. T. (N.S.) 631.

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those who would be entitled as next of kin if the wife had died immediately after the husband requires that the words of the gift over should be construed so as to entitle a different class of persons according to the event. For example, the wife might have survived the husband many years, and her next of kin at her death might be very different from those who would have been next of kin if she had died immediately after him, who might also differ, as they do in this case, from her next of kin at her death in his lifetime. This is not an impossible construction, but it may be argued that it is not a probable intention. Moreover, the argument requires the Court to fix a time for the supposed death, which the settlement has not done except by the words "in case the wife having survived the husband were to die," &c. These words, it is said, must be read "as though she were to die immediately after the husband."

It is argued that the object of the peculiar wording of the ultimate limitation is obviously only to exclude the husband in case he should survive. But, if it had not been for this limitation, the husband surviving the wife would take her personal estate in his common law right, not by virtue of the *Statutes of Distribution*. Therefore, if he be excluded, it must be by substituting as *cestuis que trust* persons who could not have any right under those statutes, that is, if the husband is excluded, and a class of persons is substituted, it must be an artificial class.

When once that conclusion is arrived at there is no presumption in favour of the persons entitled under the statutes at the actual death of the wife. That class substituted for the husband would be as artificial as any other. There is therefore no reason to depart from the grammatical meaning of the words. They cannot mean the persons who, if the husband survive the wife, are entitled under the statutes, or will then be entitled. There cannot be any such persons. The words are, who "would then be entitled." Those words are only applicable to a supposed event. What is that supposed event? It is the wife surviving the husband and then dying possessed thereof and intestate. It is impossible grammatically to read that as describing the persons who would be entitled at her actual death in the husband's lifetime as though he had predeceased. The words mean literally,

"You are to suppose that the wife having survived the husband were to die possessed thereof and intestate, and to ascertain the persons who would then be entitled under the statutes." Reading "then" as meaning "in that event," the event supposed is the wife surviving the husband and dying after him. It would have been easy to have worded the limitation thus, "the persons who would have been entitled under the statutes at the wife's death if the husband had died in her lifetime," if that had been the intention. But those are not the words; and as the class must be an artificial one in the event, which has happened, of the husband surviving, there is no reason to do violence to the actual words in order to substitute one artificial class for another.

In *Pinder* v. *Pinder* (1) the trusts of a settlement were, for the husband for life, wife for life, children of the marriage, and if none, for the wife if she survived, but if the husband survived then, after his death, for the appointees of the wife, and in default, for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled to the personal estate of the wife in case she had survived her husband and had died possessed of the same intestate, and to be divided among them according to the statute. Lord *Romilly* held that the word "then," if it stood alone, might be read "thereupon," or, "on that occasion," but that the additional words, "in case she had survived the husband and had died possessed of the same intestate," shewed that the class intended to take were the persons who would have been her next of kin if she had died immediately after her husband.

In a subsequent case in the same volume, *Chalmers* v. *North* (2) where the words were the same, his Lordship came to the same conclusion.

On the other hand, in *Druitt* v. *Seaward* (3), where the words were, "In trust for such person or persons who, under or by virtue of the statutes made for the distribution of estates of intestates, would on her decease have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate," the next of kin of the wife at her own death were

(1) 28 Beav. 44. (2) 28 Beav. 175.
(3) 31 Ch. D. 234.

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held entitled, although she had died in the lifetime of her husband.

This was followed in *Re Bradley* (1), where the limitation in a settlement, after trusts for the wife during joint lives, then for the husband for life, were for the wife absolutely if she survived, but if she died in the husband's lifetime, in trust for her appointees, and in default "for the person or persons who, under or by virtue of the statutes," &c., "would, on the decease of the" wife, "have been entitled thereto in case she had survived the" husband "and had then died possessed thereof intestate," &c.

In the two last-mentioned cases the learned judges who decided them did not profess to adopt the grammatical construction of the words, but held that the object was simply to exclude the husband; and for this reason they considered the wife's next of kin at the actual time of her death were intended.

With great respect, adopting that theory, I see no reason for arriving at such a conclusion. The exclusion of the husband, as I have pointed out, makes it necessary to substitute an artificial class; and why any other class should be preferred to that which the words, taken literally, describe, I am not able to imagine.

I therefore hold that the persons to take are those who would have been entitled to the wife's personal estate if she had survived her husband and died immediately after him.

Solicitors: *P. G. C. Shaw*, agent for *Odden F. Read, Mildenhall; S. Newman; Boulton, Sons, & Sandeman.*

(1) 58 L. T. (N.S.) 631.

G. I. F. C.

In re MYSORE WEST GOLD MINING COMPANY.

CHITTY, J.

1889
July 27.

Company—Voluntary Winding-up—Arbitration—Liquidator—Commission to Examine Witnesses Abroad—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 138, 161, 162 [*Revised Ed. Statutes, vol. xiv., pp.* 233, 237]—*Supreme Court of Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 100 [*Revised Ed. Statutes, vol. xvii., p.* 95]—*Rules of Supreme Court,* 1883, *Order* XXXVII., *r.* 5.

Where a company is in voluntary liquidation and a dispute has arisen as to the price to be paid for the purchase of the interest of a dissentient member which, under sect. 162 of the *Companies Act,* 1862, has been referred to arbitration, the Court, on the application of the liquidators, has jurisdiction under Order XXXVII., rule 5, of the Rules of the Supreme Court, 1883, to order a commission to issue for the examination of witnesses abroad, the matter being one arising in the winding-up within sect. 138 of the *Companies Act,* 1862, and the reference to arbitration being compulsory under the Act.

The Court will not give assistance to a domestic forum.

THE above company was incorporated in January, 1886, with a capital of £125,000, in £1 shares, and in November, 1888, passed resolutions to wind up voluntarily, and for the sale and transfer, under sects. 161 and 162 of the *Companies Act,* 1862, of its business and property to a new company.

By an agreement between the liquidator of the *Mysore West Gold Company* and the new company it was agreed that the capital of the new company should be £130,000, in shares of £1 each, credited with 15*s.* as paid thereon, and that three of such shares were to be given in respect of two fully paid-up shares in the old company.

On the 22nd of November, 1888, notice of dissent from the scheme was served on the liquidator by the *Kaiser-i-Hind Gold Mining Company,* whose registered office was at *Bombay,* and who were holders of 12,750 shares in the old company, and by such notice the liquidator was required either to abstain from carrying into effect the resolution for reconstruction or to purchase the interest of the Defendant company at a price to be determined by arbitration, as provided by sects. 161 and 162 of the *Companies Act,* 1862.

The arbitration was commenced in January, 1889, and for the

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purpose of ascertaining the value of the company's assets, which consisted of gold mines in *India* and shares in another company having gold mines in *India*, the liquidator of the *Mysore West Gold Company* took out a summons entitled in the matter of the *Companies Acts*, 1862 and 1867, for liberty to issue a commission to *India* for the examination of witnesses there.

The question was whether the Court had jurisdiction to make the order in the case of an arbitration under sects. 161 and 162 of the Act.

Byrne, Q.C., and *Grosvenor Woods*, in support of the summons:—

Previous to the *Judicature Act* the Court of Chancery would have acceded to such an application as this on a bill for discovery: *British Empire Shipping Company* v. *Somes* (1); *Thorpe* v. *Macauley* (2).

Under Order XXXVII., rule 5, of the Rules of the Supreme Court, the Court has power to make the order in the case of a compulsory winding-up, and it can make no difference that this is a voluntary winding-up. The liquidator is entitled to make the application as it is a matter arising in the liquidation within sect. 138 of the *Companies Act*.

Emden, for the dissentient member:—

The present application is not made in a "cause or matter" within the meaning of Order XXXVII., rule 5, and the cases cited on the other side have no application. Sect. 100 of the *Judicature Act*, 1873, limits the power of the Court to matters and actions actually before it; the definition of "matter" includes any proceeding in the Court not in a cause.

If the Court is against us we still say there is no necessity for any further evidence, as the scheme of reconstruction fixes the value at 15*s*. a share.

There has been such delay here that the Court will not assist the liquidator: *Steuart* v. *Gladstone* (3).

Byrne, in reply.

(1) 3 K. & J. 433. (2) 5 Madd. 218.
(3) 7 Ch. D. 394.

CHITTY, J.:—

The company is in voluntary liquidation, and an agreement for the sale of its assets has been entered into under sect. 161 of the *Companies Act*, 1862. A member of the company, who dissents, requires the liquidator to abstain from carrying the sale into effect, or to purchase the dissentient member's interest at a price to be determined under sect. 162 of the Act. The section says:—"The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of the *Companies Clauses Consolidation Act*, 1845, with respect to the settlement of disputes by arbitration, shall be incorporated with this Act." The parties have disputed about the price and have resorted to arbitration under the section which I have read, and this is therefore a compulsory arbitration, meaning thereby that there being a dispute as to the price it cannot be determined otherwise than by arbitration under sect. 162 of the *Companies Act*, 1862.

Now Order XXXVII., r. 5, of the Rules of the Supreme Court, 1883, is as follows:—"The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or Judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct." It is said by Mr. *Emden* that if an order is made on this application it will not be made in a matter within the meaning of that term as used in the rules, and he referred to the definition of "matter" in sect. 100 of the *Judicature Act*, which is, that "matter" shall include every proceeding in the Court not in a cause; and the term "cause" includes "any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown." Mr. *Emden* says that the matter now before me is not within that definition. But the answer is plain. This application is in a matter; otherwise the parties could not come here. It is in the matter of

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the *Companies Act*, 1862, and, the company being in voluntary liquidation, the present question is one arising in the matter of such winding-up, and determinable upon an application by the liquidator under sect. 138 of the *Companies Act*, 1862. It is, therefore, plain that this is a matter within rule 5 of Order XXXVII.

I must, then, see that the purposes of justice render it necessary that there should be a commission. The property of the company consists of gold mines in *India*, with the exception of some assets, consisting of shares in another company which also owns gold mines in *India*.

The dissentient member is a company, and Mr. *Emden* says the liquidator is bound by the agreement between himself and the new company, and must value the interest of a dissentient member according to the valuation which has in that agreement been made of the interest of the other members who are not dissentient members. Now I think that the fact of such a valuation being the basis upon which a reconstruction has been effected is to be carefully considered, and to have due weight given to it, but it is not in itself conclusive so as to fix the proper price which the liquidator should pay in respect of the interest of a dissentient member. Where a new company is purchasing the assets of a company in liquidation, and the new company brings new capital into the concern, it does not at all follow that the price per share as fixed between the company in liquidation and the new company forms the true price which has to be determined by the arbitration.

It is often worth a man's while if he has capital to buy a concern which has come to a standstill for want of capital; he might give what after all was a fair price as between vendor and purchaser, but much more than the breaking-up price obtainable in the market. The dissentient member cannot ask for a valuation as between vendor and purchaser, because the company, so far as he is concerned, has come to an end, and he is in the position of a man who has not got capital wherewith to buy the concern which has come to a standstill for want of capital.

Mr. *Emden* then argued that the Court will not give assistance to an arbitration. This was met by the two cases which have

been cited, and which come to this, that the Court will not assist a mere domestic forum; but when the forum is made by Act of Parliament the only tribunal for the determination of a question the Court will render assistance. That is the effect of the decision of Lord *Hatherley*, when Vice-Chancellor *Wood*, in *British Empire Shipping Company* v. *Somes* (1). Speaking of the reason why the Court will not assist an arbitration which is merely a domestic forum, Lord *Hatherley* says: "It is clear that it cannot be in any way applicable to a case like the present—a case of compulsory arbitration before a public forum which the Legislature has provided for the determination of questions like the present; not a voluntary arbitration before private friends, but before the tribunal which the Legislature has thought fit to employ." I do not quite know what Lord *Hatherley* may have meant by a "public tribunal," and perhaps the word "public" is not quite the right one. I would prefer to use the word "statutory" instead of public, and with that criticism, which is only verbal, I am prepared to adopt Lord *Hatherley's* observations.

The only other point is that of delay, and, although there has been some delay, I think that there has been no delay sufficient to justify the refusal of the application, which I grant.

The costs of this application will be costs in the arbitration.

Solicitors: *Snell, Son, & Greenip; Trinders & Co.*

(1) 3 K. & J. 433, 436.

G. M.

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July 30.

In re SOVEREIGN LIFE ASSURANCE COMPANY.

Life Assurance Company—Transfer of Business—Scheme—Policy-holder—Insolvent Company—Winding-up—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *ss.* 2, 14 [*Revised Ed. Statutes, vol. xvi. pp.* 359, 361]—*Life Assurance Companies Act*, 1872 (35 & 36 *Vict. c.* 41), *s.* 7 [*Revised Ed. Statutes, vol. xvi. p.* 961].

A life assurance company was incorporated in 1845 under a deed of settlement which contained no provision for the sale or transfer of its business. In 1865 the company took over the business of an annuity company, and covenanted, by deed, in 1866, to guarantee the payment of certain annuities. In August, 1887, a petition for the compulsory winding-up of the company was presented, which stood over in the hopes that some scheme of arrangement might be adopted. In July, 1889, a scheme was proposed by the policy-holders for transferring the policies, *en bloc*, to another company, on terms advantageous to the policy-holders, but involving a reduction of the amounts originally assured. The proposed scheme made no provision for the annuitants claiming under the deed of 1866. On the petition coming on again for hearing, application was made by the directors, at the instance of the policy-holders, for leave to present a petition under sect. 14 of the *Life Assurance Companies Act*, 1870, to obtain the sanction of the Court to the proposed scheme, and that in the meantime the hearing of the petition might again be postponed. The annuitants objected to the scheme, as did also the shareholders:—

Held, that sect. 14 of the *Life Assurance Companies Act*, 1870, conferred no power on an assurance company to transfer its business to another company; that, assuming a company had power to transfer, this section only contemplated a transfer of the whole of the assurance business as a going concern without any reduction in the policies, or any fresh contracts with the policy-holders; that the annuitants under the deed of 1866 were "policy-holders" within the definition given by sect. 2, whose dissent, as representing more than one-tenth of the total amount assured, would, under sect. 14, be fatal to the scheme; that the scheme was therefore impossible and the application of the directors could not be allowed; that, as the company was hopelessly insolvent, the winding-up order must be made.

Semble, the dissent of one policy-holder would invalidate such a scheme as proposed.

IN August, 1887, a petition was presented by a policy-holder for the compulsory winding-up of this company.

On the 2nd of September, 1887, a provisional liquidator was appointed, and the sums payable in respect of premiums by the policy-holders of the company were directed to be carried to a

suspense account until the order on the petition was made. On the 7th of September, 1887, the provisional liquidator was continued, and he was then directed to report to the Court as to the value of the assets and liabilities of the company as on the 4th of August, 1887, with liberty to engage two actuaries or other persons to value such assets and liabilities.

Pending the preparation of this report, which was not finally completed and filed till the 2nd of January, 1889, the petition stood over, and during this period, and until the petition was ultimately disposed of, numerous applications were made to the Court, and negotiations entered into, in the hopes of arranging some scheme of transfer to an existing company, or reconstruction, by which the necessity for a winding-up order might be avoided; the precise dates and details of these applications and negotiations are not material for the purposes of this report, with the exception of a scheme for transfer brought forward by the policy-holders in July, 1889, which is referred to hereafter; and for the purposes of this report the following summary of the position and affairs of the company will be sufficient.

The company was incorporated in 1845 under a deed of settlement with a capital of £500,000 in 50,000 £10 shares, of which 18,000 had been issued on which £3 10*s.* had been paid or called. The deed of settlement contained no power for the sale or transfer of its business to another company, though it contained a power enabling a majority of two-thirds of the shareholders to alter, vary, and add to its provisions. The company was subsequently registered under the *Companies Acts.*

In 1865 the company purchased the business of the *General Annuity Endowment Association,* and by a deed of the 22nd of June, 1866, certain funds were vested in the trustees of that deed for the benefit of the annuitants of the last-mentioned association, and the company thereby covenanted with the trustees to guarantee to them the amounts, if any, that might be required to make good any deficiency in the said fund.

It appeared from the provisional liquidator's report that the liabilities of the company were about £460,000 and its assets about £235,000. A copy of this report was sent to all the policy-holders with a circular convening a meeting of the policy-holders

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for the 11th of January. The provisional liquidator in his report advised the parties interested to agree to a scheme for reduction of the company's contracts rather than allow the usual winding-up order to be made; but this was found to be impossible, chiefly owing to the heavy claim (nearly £70,000) made against the company by the trustees of the deed of 1866 under the guarantee thereby given.

On the 11th of January a committee of policy-holders was appointed who, with the assistance of the provisional liquidator and of actuaries specially consulted for the purpose, prepared and completed in the middle of July a scheme for the transfer of the assurance business of the company to another life assurance company by which, stated shortly, it was proposed to transfer all the assets of the company to the transferee company, including a sum of over £60,000 which had been carried to the suspense account in pursuance of the order of the 2nd of September, 1887; to transfer all the policy-holders in a body, without any fresh medical examination, the premiums in respect of these policies to remain unaltered, but the amounts of the policies to be reduced according to the age of the assured at the date of the transfer.

No provision was proposed to be made by this scheme for the annuitants claiming under the deed of June, 1866.

A first-rate office (the *Sun*) was willing to negotiate with the company on the lines of this scheme, and the directors accordingly, at the instance of the policy-holders, took out a summons for leave to present a petition under sect. 14 of the *Life Assurance Companies Act*, 1870, or to take such other steps as they might be advised for the purpose of endeavouring to carry out the proposed scheme of transfer, and asking that the costs, charges, and expenses of all such proceedings might be allowed and paid out of the estate of the company, and that they might also be indemnified against the costs of all parties appearing on this proposed petition.

This summons was directed to come on for argument with the petition for winding-up. The petition and summons now came on together.

The main question for decision and the only one requiring a detailed report was argued and determined upon this summons.

Whitehorne, Q.C., and *Boome*, for the petition, referred to the provisional liquidator's report as shewing the hopeless insolvency of the company, and asked that the usual compulsory order for winding-up might now be made.

Whinney (*Latham*, Q.C., with him) opened the summons, and stated that the directors were quite willing to do all in their power to help carry out the scheme, if the Court was satisfied that it was a practicable one, on being allowed their costs and being indemnified out of the estate of the company.

Swinfen Eady, for the committee of policy-holders:—

The scheme, if it is sanctioned, is clearly beneficial to the policy-holders, and it appears under the circumstances to be the best thing to be done; it has the approval of the provisional liquidator and of the great bulk of the policy-holders. What is proposed is within the scope of sect. 14 of the *Life Assurance Companies Act*, 1870. The life assurance business is to be transferred on terms which, considering the assets and liabilities of the company, are advantageous.

[CHITTY, J.:—No provision appears to have been made for the annuitants claiming under the deed of 1866: does not provision for these annuitants form part of the business of life assurance?]

Possibly it does, but what is proposed is to transfer the life assurance business properly so called; the words of the section are general and contain nothing that forbids a transfer of part of the business. The whole must contain a part, and it could not have been intended that the whole of the business must be transferred, or else nothing be done under this section. My contention is, that the consent of the trustees of the deed of 1866 or of the annuitants claiming under it is not necessary, because they are not "policy-holders."

[CHITTY, J.:—You say, then, that the definition of "policy-holder" in sect. 2 as a person holding a "contract with the company" does not apply to the guarantee given by that deed?]

Yes. Policy-holder in this section 14 only means a policy-holder in respect of the business intended to be transferred; that

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is here, the policy-holders directly under contract with the company, and with regard to these policy-holders the Court can under sect. 22 reduce the amount of their contracts with the company, so that the fact that the policy-holders, properly so called, are to have a smaller sum than the amount originally assured need be no objection.

If the winding-up order is delayed a little longer, probably the deed of settlement can be altered, if this sect. 14 is not an enabling section, so as to obtain a power to transfer.

Dauney, for the representatives of a deceased policy-holder, supported the scheme.

Maclean, Q.C., and *Devonshire*, for the trustees of the deed of June, 1866, opposed the scheme, and stated that on behalf of the annuitants they would not consent to any transfer on the lines proposed; and, being as they submitted "policy-holders" within the definition of sect. 2, their consent was absolutely necessary before the scheme could be carried out; they also supported the petition for winding-up.

Sir *Arthur Watson*, Q.C., and *Chadwyck Healey*, for 80 per cent. of the shareholders, opposed the scheme and supported the petition.

Ribton, for a shareholder, and

Trustram, for a policy-holder, also opposed the scheme.

Romer, Q.C., and *Hull*, for the provisional liquidator:—

Though we approve of the scheme, if it is practicable, there are several serious objections which we ought to point out to the Court. Sect. 14 is not an enabling section and confers no power to transfer the business. The deed of settlement contains no power, and under the circumstances it is not probable that an alteration of the deed of settlement will be obtained. Unless the consent of all the policy-holders is obtained, this company will not be freed from liability. The *Life Assurance Companies Act*, 1872, s. 7, provides for this: *In re London and Southwark*

Insurance Corporation (1); and we have here one policy-holder at least who objects. True, in *In re Argus Life Assurance Company* (2) a scheme was sanctioned notwithstanding the opposition of a policy-holder, but sect. 7 of the 1872 Act does not appear to have been cited; but then that was a sale by a going company, which this is not. Sect. 14 is framed for the transfer of the life assurance business as a going concern to another company who will take over the policies on equal terms.

Then it is a proposal to transfer a part only of the business.

Whitehorne, in reply:—

Sect. 14 does not apply to an insolvent company. An application of this kind cannot be used to block or delay a winding-up order. Another objection to the scheme is that it proposes to put an end to the current contracts as to the policies, and enter into fresh contracts; this is not what is contemplated. The scheme cannot be made to bind a dissentient minority or even one dissentient policy-holder. It also proposes further to diminish the assets by allowing the directors to take the costs out of the estate. The proposal is hopeless and impracticable and a winding-up order ought now to be made.

CHITTY, J.:—

This is a petition to wind up *The Sovereign Life Assurance Company*, and this Petitioner presents a clear case; unfortunately the assets of the company, speaking in round numbers, are about one-half the liabilities, consequently the Petitioner is now entitled to an order *ex debito justiciæ*.

The Court has from time to time listened to applications made for the postponement of the final decision upon this petition at the request of many persons interested and with the consent of practically all concerned. The result has been that a delay of two years has occurred; and I may say that the object of all parties has been, so far as possible, to avert that which unquestionably is a great catastrophe. Consequently it has not been with any reluctance on the part of the Court that the applications that have been from time to time made and assented to

(1) 28 W. R. 565. (2) 39 Ch. D. 571.

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have been acceded to by the Court; but now the Petitioner says there has been sufficient delay, that there has been sufficient opportunity to all concerned to see whether they can do anything practicable to avert this disaster, with the result that nothing has been done.

Now the application for further delay arises upon a summons taken out by the directors at the instance of the policy-holders. The policy-holders have been endeavouring to see what they can do to stop the winding-up proceedings, and they have appointed a committee, which, I gather from the statements that have been made to me at the Bar, has really been appointed by a very considerable number of the policy-holders, and the committee have at last produced a scheme which they have put forward about the middle of this month. There is no blame attached to this committee for not having put forward their scheme before, because anybody concerned practically with affairs of this kind knows the difficulty there is in getting a large, loose, unconnected body of men, such as policy-holders are, together, and in coming to any terms that might be acceptable even to the large majority. Therefore I am not making any adverse observations against this committee of policy-holders in saying that they have come forward very late with their proposed scheme, and, though it must be an element in my decision, I will not make it the sole ground, as possibly I might judicially do, that they have come forward at so late a time.

The proposition of the directors is that they should be at liberty to present a petition under the 14th section of the *Life Assurance Companies Act*, 1870, and I have to consider whether a *primâ facie* case has been laid before the Court for the purpose of shewing that the proposed proceedings under this 14th section would result in any benefit, in fact, whether anything practical can be done under that section if a petition is presented. The only persons who can present a petition under this section are the directors themselves, and the directors in the present case say that they are willing to assist all concerned, particularly the policy-holders, and that accordingly they will allow their names to be made use of upon an indemnity.

Numerous objections have been raised to the proposed scheme. The first is, that it is quite clear that sect. 14 is not an enabling

section, and of itself confers no power on a life insurance company to transfer its life assurance business to another company. The scope of this section is in fact simply negative, and its operation is best seen by reading the paragraph towards the end which says, "No company shall amalgamate with another, or transfer its business to another, unless such amalgamation or transfer be confirmed by the Court in accordance with this section." Now the position of *The Sovereign Life Assurance Company* is this. It has at the present moment no power to transfer its assets to another company, though there is a provision in the deed of settlement enabling a majority of two-thirds of the shareholders to vary or add to the provisions of that deed; but a very considerable body of the shareholders, 80 per cent., I am told by Sir *Arthur Watson*, are averse to the proposed scheme: what chance is there, then, that two-thirds of the shareholders will agree to alter their deed of constitution so as to confer the power on the company itself of making this transfer? The chances are so small that I think that ground alone would be sufficient for me to dispose of the application.

But there are other objections which I will not pass by. The principal argument in support of this proposed scheme comes from the committee of policy-holders, very ably represented by Mr. *Swinfen Eady*. The proposition embodied in the scheme is, putting it shortly, to transfer a portion only of the assurance business of the company to an existing company, the *Sun Office*. Sect. 14 is so framed as to shew that what must be done under this section, where the power already exists in the company, is to transfer what the section itself terms "the business of life assurance," and Mr. *Swinfen Eady* was compelled by stress of circumstances to say that this would justify the transfer of a part of that business; he was compelled to say that, because if the term "policy-holder" in the section includes the annuitants claiming under the deed of June, 1866, who appear by Mr. *Maclean*, it is quite plain that there would be a dissent exceeding the one-tenth, which is sufficient, according to the subsequent part of this section, to prevent the Court giving its sanction to this scheme.

I do not propose to go through all the objections taken to this

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proposal, some of which I have already dealt with in the course of the argument with reference to the construction of this section. It will be sufficient for me now merely to state shortly my conclusions. The term "policy-holder" is used in the body of this 14th section, and it is said that this term would not include the annuitants or the trustees under the deed of June, 1866. [His Lordship stated the facts as to these annuitants as above, and continued:—] But Mr. *Maclean's* clients, as trustees, also have a covenant from *The Sovereign Life Assurance Company* of guarantee to them of the amounts, if any, that are required to make good any deficiency in the fund. The fund that the trustees of this deed hold being insufficient for payment in full of the annuities at the present time, the trustees by virtue of that guarantee have a demand against *The Sovereign Life Assurance Company*, and that demand makes them, in my opinion, policy-holders within the meaning of sect. 2 of the Act, which declares that "policy-holder" means the "person who for the time being is the legal holder of the policy for securing the life assurance, endowment, annuity, or other contract with the company." The trustees are the covenantees; they have the legal right to sue on the covenant, and the covenant is the contract for securing the annuities. That is sufficient, therefore, to shew that the trustees are "policy-holders" within the 14th section, and then, when the question of dissent of the one-tenth comes to be considered, their dissent, which is plainly expressed now, would be sufficient to prevent any order being made adverse to it.

There are other objections which it is not necessary for me to enter into fully here, but they are objections which are of a serious character, namely, to the nature of the proposed transfer, that it will not be a transfer of the existing business—that is of the existing policies to the *Sun Office*, so that the *Sun Office* will be answerable for the amounts purported to be secured by the policies to the policy-holders, but the *Sun Office* will only become answerable for a reduced amount, the premiums of the policy-holders being still continued at the original rates. The *Sun Office* is making what appears to be a bargain with the policy-holders, which, under the circumstances, will no doubt be advantageous, I am not questioning that, and my judgment proceeds upon the

footing and upon the assumption that what is proposed to be done would be beneficial; I am only considering whether the Act of Parliament would allow it, and now I find that the policy-holders would not find under this scheme, if it were eventually sanctioned, that their policies were going to be continued on foot as existing policies, but they would find that their policies were reduced in amount.

But then comes the further objection, and a serious one, that one dissent by a policy-holder would be enough to prevent a transfer of this kind being held good. It appears to me that that objection also is a good one, and I think, after what I have said, it would be useless for me to travel further. There is this matter also that I have to consider. The proposition is not that the directors should present the petition at their own risk, or present the petition upon the indemnity of the committee of policy-holders, but that they should present the petition at the risk of the general assets. It is clear on the facts before me, and I am afraid nothing hereafter will occur to alter it, that *The Sovereign Life Assurance Company* is utterly insolvent, and consequently that the whole amount of the uncalled capital will be required. It is plain too that in winding up an insurance office such as this is, the liability on the policies is a limited liability by virtue of the terms of the policies themselves; but there is a question in this case which I am not called upon now to decide, but which I merely mention to shew that it has not escaped observation—whether the shareholders are not by reason of what took place when the *General Annuity Endowment Association* made over its funds—under an unlimited liability in respect of the annuities which fall primarily upon the fund held by the trustees who are represented by Mr. *Maclean*. So that there is a question with regard to the shareholders of unlimited liability, and besides that it is not in question that the shareholders in a case of this kind are under an unlimited liability in regard to the costs of the winding-up. Consequently the result would be that the directors would present a petition not at their own risk, not at the risk of the real moving parties, the committee of policy-holders, but at the risk of the shareholders, Sir *A. Watson's* clients, upon whom the costs would fall.

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I think I have said enough now to shew that I cannot accede to this application. The application has been made in good faith; it is supported strongly as a practical matter by the experienced liquidator, Mr. *Welton*, and I should, if I could have seen my way, have been willing to have fallen in with the suggestion, but it is plain that it fails. I understand, having put the question to most of the counsel who appear in this matter, that they do not wish that I should proceed with severity against the directors who have taken this step, not only in good faith, but with a view to promote the true interests of the various persons concerned. That being so, there being but four separate briefs delivered, and there being no opposition, I can make the costs of the summons costs in the application to wind up, and that I accordingly do. Then I must also make the winding-up order in the usual way with the usual order as to costs.

Solicitors: *James Robinson; Witham, Lambert, & Roskell; R. C. Devonshire & Monkland; Hepburn, Son, & Cutcliffe; Eardley Holt, & Hulbert; Linklater & Co.; W. H. Mason & Son.*

W. C. D.

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CALLOW *v.* CALLOW.

[1889 C. 744.]

Will—Construction—"Securities for money"—Vendor's Lien.

A bequest of "all securities for money" will include money due to a testator in respect of which he had a vendor's lien for unpaid purchase-money.

Goold v. *Teague* (1) doubted.

ACTION.

John Callow, by his will, dated the 12th of September, 1887, after directing all his personal and testamentary expenses to be paid by his son, the Defendant, bequeathed to his wife *Elizabeth Callow* (*inter alia*) "all money in the house and all securities for money, including a mortgage to Mrs. *S.*," and appointed his said son residuary legatee. By a memorandum of agreement dated

(1) 7 W. R. 84; 5 Jur. (N.S.) 116.

the 1st of May, 1888, and made between the testator of the one part and *Walter James Mitchell* (thereinafter called the purchaser) of the other part, the testator agreed to sell to the purchaser three leasehold houses for the sum of £420, to be paid by monthly instalments of £2 10*s.*, commencing from the date of the agreement, and continuing for a period of fourteen years, and to be applied in reduction of the principal; the purchaser to have immediate possession, and to perform the covenants in the lease under which the property was held in the same manner as if the assignment to him had been made. The testator also agreed to execute an assignment of the property to the purchaser at any time upon request, the purchaser at the same time executing a mortgage of the property to the testator, to secure the balance of principal then due. The agreement then provided that if the purchaser neglected or failed to comply with these conditions, or if any monthly instalment should be six months in arrear, the testator was to be at liberty to re-sell the property either by public auction or private contract, and the deficiency, if any, occasioned by such re-sale and the attendant expenses were to be made good by the purchaser, and were to be recoverable as liquidated damages.

The monthly instalments were duly paid to the testator up to the date of his death, which occurred on the 16th of January, 1889. After the decease of the testator various questions arose between the Plaintiff, the widow, and the Defendant, the son and residuary legatee, as to the construction of the testator's will, but the only question raised in this action and calling for a report was whether the remaining monthly instalments passed under the terms of the above bequest to the Plaintiff *Elizabeth Callow*, or belonged to the Defendant, the son, as residuary legatee.

Romer, Q.C., and *Curtis Price*, for the Plaintiff:—

These instalments are secured by the memorandum of the 1st of May, 1888, which is clearly "a security for money" within the terms of the bequest.

Byrne, Q.C., and *E. Clayton*, for the Defendant:—

What the testator had at the time of his death was nothing

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more than his vendor's lien for unpaid purchase-money, and a vendor's lien has been held not to be a "security for money:" *Goold* v. *Teague* (1). The remaining instalments therefore pass to the residuary legatee.

Romer, in reply:—

Goold v. *Teague* has been questioned in *Sugden's* Vendors and Purchasers (2), and in *Dart's* Vendors and Purchasers (3). It is not good law.

CHITTY, J. (after stating the facts and the terms of the bequest and of the agreement of the 1st of May, 1888, as set out above, continued):—

Now the question is, whether under these circumstances the testator had or had not a security for this unpaid purchase-money. I think he had. The testator had also a vendor's ordinary rights under his lien, and he had also in this case, if an assignment had been executed to the purchaser, a right to have a formal mortgage for the remaining instalments, and he also retained by the agreement a power of sale in case the purchaser made default or failed to comply with any of its conditions. I cannot see any difficulty in the case, but *Goold* v. *Teague* has been cited in support of the proposition that a vendor's lien for unpaid purchase-money is not a security for money, and no doubt there are words in the judgment of that case to that effect. The case is reported very briefly in the *Weekly Reporter*, and, as far as I can make out, the Vice-Chancellor *Page Wood* does not appear to have relied solely on the statement I have referred to, but to have proceeded on other words also—in fact, upon the terms of the will as a whole. That decision was therefore a decision on the words of that particular will; it appears to have been questioned by the text-writers to whom I have been referred, both Lord *St. Leonards* and Mr. *Dart*, and if it were directly in point I may say that I do not think I should follow it; but, as I have already said, it is distinguishable. That being so, I have no hesitation in coming to the conclusion that

(1) 7 W. R. 84. (2) 14th Ed. p. 684.
(3) 6th Ed. p. 827.

this agreement is a "security for money," and that the balance of the sums so secured by it pass to the Plaintiff under the words of the bequest.

Solicitors: *Yarde & Loader*; *Boulton, Sons, & Sandeman.*

W. C. D.

In re ROBERTSON (A SOLICITOR).

CHITTY, J.
1889
July 19; *Aug.* 2.

Costs—Taxation—Third Party—Delivery—Petition of Course—Service of Order—Practice—Attorneys and Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 38 [*Revised Ed. Statutes, vol. ix., p.* 130.]

R. and *B.* acted jointly in a sale of copyholds to which their respective clients were entitled, *B.* having the conduct of the sale. The purchaser required the property to be enfranchised, and wrote to *B.* asking him to arrange for the enfranchisement, and undertaking to pay his charges and the expenses. *R.* made out his bill of costs against his own clients, sent it to *B.*, who sent it to the purchaser. The purchaser obtained an order for taxation of this bill on the usual petition of course by a third party. On motion by *R.* to stay all further proceedings under this order:—

Held, that the common form allegation in a petition of course, that the solicitor "delivered to your petitioners his bill of fees and disbursements," is a material allegation which is not satisfied by a merely constructive delivery; that in the circumstances of this case there had been no delivery to the purchaser; and that the order had been irregularly obtained, and must be discharged.

Practice of the Taxing Masters as to service of the orders to tax stated.

Delivery and constructive delivery to third parties liable to pay discussed and considered.

MOTION.

In September, 1888, certain copyhold premises at *Hanwell*, in the county of *Middlesex*, belonging, as to one-third, to a Mrs. *Mary Pemberton*, and as to two-thirds to Messrs. *C. S. Burton & Bird*, were put up for sale, and purchased by one *G. E. Frere.*

C. H. De Grey Robertson and *Walter Avery Bird*, two solicitors, acted jointly in the sale, *Robertson* for Mrs. *Pemberton* and *C. S. Burton*, and *W. A. Bird* for the other joint owner of the two-thirds. *W. A. Bird*, however, had the conduct of the sale, and appeared on the contract as the vendor's solicitor.

On the 19th of October, 1888, *G. E. Frere* wrote to *W. A. Bird*,

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as the solicitor for the vendor, and, as he then believed, the only person acting professionally for them:—"I am much obliged to you for extending the time for requisitions, which will be sent in a day or so. Subject to these, I should be glad if you will arrange for the enfranchisement of this lot, so as to be able to convey it as freehold, and I will pay your charges and the expenses."

This letter was not forwarded to *Robertson*, but *W. A. Bird* informed him that the purchaser required the property enfranchised, and requested him to do what was necessary on behalf of his clients to carry out the enfranchisement.

Robertson thereupon took the necessary steps on behalf of his own clients, and completed the enfranchisement so far as their interests were concerned.

On the 28th of May, 1889, *Robertson* was requested by *W. A. Bird* to send in all his costs to him. *Robertson* accordingly made out his bill of costs relating to the enfranchisement, addressed to his clients, Mrs. *Pemberton* and *C. S. Burton*, and amounting to £17 7*s*., which he sent to *W. A. Bird*, who subsequently sent it on to *G. E. Frere*.

In sending this bill of costs to *W. A. Bird*, *Robertson* wrote saying that he was not aware of the nature of the undertaking as to costs between the purchaser and the vendors, and was therefore doubtful what costs could be properly included; he also, on the 29th of May, wrote to *G. E. Frere*, stating that he had sent his bill of costs to *Bird*, but that, as he did not know the terms of the undertaking, he feared some of "the costs may prove incorrect."

G. E. Frere disputed the bill of costs, and *Robertson* then offered to withdraw it and make out a fresh bill strictly as against the purchaser, or to obtain payment of his costs from *Bird*, leaving him to obtain them from *G. E. Frere* under the terms of his letter of the 19th of October, 1888. This was declined by *Frere*, and a long correspondence passed between them with a view to a settlement, but to no purpose; and ultimately, on the 13th of June, 1889, *G. E. Frere* obtained an order for taxation of this bill on the usual petition of course by a third party, containing the usual allegation that on or about the 28th day of May the said solicitor "delivered unto the Petitioner his bill of fees and

disbursements which the Petitioner is liable to pay," under which, in *Robertson's* absence, the bill was taxed down to £5 3*s*.

Robertson alleged that he had never been served with the order to tax, though it was admitted that notice of the two appointments for the 27th of June and the 6th of July had been sent to him by post from the Taxing Master's office according to the usual practice.

Robertson subsequently served *G. E. Frere* with notice of motion for the 12th of July that all further proceedings under the order might be stayed, and that it might be discharged as irregular.

Oswald, for the motion:—

The proceedings taken under this order to tax were wholly irregular, as *Robertson* was never served with the order, and the taxation proceeded in his absence.

[CHITTY, J.:—The order itself, which I have before me, contains no direction as to service; the practice, I believe, in such a case as this is that the Taxing Master should send notice of the appointment as he did here.]

I submit that in any case the order must be served by the party who obtained it before proceeding to taxation.

[CHITTY, J.:—The Registrar who has been to make inquiries of the Taxing Masters informs me that the practice is, that where an order to tax is obtained by a solicitor against his client, the usual form of order shews that service is necessary; but that where the client gets an order against the solicitor, taxation may be proceeded with without service of the order on the solicitor.]

The bill was never, in fact, delivered to *Frere* at all, and the allegation to that effect in the petition was untrue. This is a material allegation which is not satisfied by a merely constructive delivery; the order is therefore irregular on that ground: *In re Carven* (1).

Frere was not the party chargeable under sect. 38 of the *Attorneys and Solicitors Act*, and a mere volunteer cannot acquire a right to tax: *In re Becke & Flower* (2). Sect. 38 has reference only to the taxation as between solicitor and client: *In re*

(1) 8 Beav. 436. (2) 5 Beav. 406.

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Grundy, Kershaw, & Co. (1). The undertaking in the letter of the 19th of October was only a personal undertaking: *Ex parte Docker* (2). Irregularity being a matter entirely governed by statute, cannot be cured by acquiescence or delay. Had *Robertson* been allowed to recast this bill, and deliver a fresh one when he knew of the nature of *Frere's* undertaking, all this might have been avoided. The order is irregular, and should be discharged with costs.

Farwell, for *Frere, contrà*:—

This order was properly obtained under the third-party clause by the person liable to pay. By the letter of the 19th of October *Frere* made himself liable, and *Robertson* knew it, though he may not at the time have known the exact terms of that undertaking. The allegation as to delivery in the petition is in the usual form, and is satisfied by constructive delivery, through *A. W. Bird.* It is the every-day practice, in cases of a mortgagee or trustee, where the bill is eventually to be paid by the mortgagor or *cestui que trust.*

[CHITTY, J., referred to *In re Brown* (3).]

In re Carven (4) was not a third-party case at all. None of the cases relied on for the motion are applicable to the present case. The question as to service has been already dealt with, though as a fact we allege that the order was served. I submit that the order was regular, and that this motion must be refused.

Oswald, in reply.

CHITTY, J. (after referring to the bitterness with which the dispute appeared to have been conducted, the waste of time, and the delay caused in the completion of the purchase, and stating the facts and correspondence as above, continued):—

Under these circumstances Mr. *Frere* has obtained the common third-party order to tax, and the order contains, what seems, from the various forms that I have been able to look at, to be the usual and common allegation in a third-party order, that the solicitor

(1) 17 Ch. D. 108.
(2) 26 W. R. 633.
(3) Law Rep. 4 Eq. 464.
(4) 8 Beav. 436.

has "delivered" the bill "to the Petitioner," the person whose right to tax of course arises under the 38th section. The facts in the present case, however, shew no direct delivery to Mr. *Frere*.

[His Lordship, after referring to *Robertson's* statement that he was not aware of the exact terms of the purchaser's undertaking, as to the costs of the enfranchisement, to the fact that the purchaser was not aware that there was more than one solicitor acting in the matter, and to *Robertson's* offer to deliver a fresh bill of costs, continued:—]

Now I am going to decide this case on what after all may well be rather a narrow ground, but what I am satisfied in point of law is the correct ground. There are several ordinary, or what I may call "typical" third-party cases; cases where the mortgagor is liable to pay the costs of his own mortgagee. In such a case as that, where the bill is taxed as between the mortgagor on the one hand and the mortgagee's solicitor on the other, the mortgagor is entitled to stand in the position of the mortgagee himself.

Now, delivery in the ordinary practice by the mortgagee's solicitor of his bill of costs is not to his own client, but it is to the mortgagor or to the mortgagor's solicitor; and consequently one finds that in the common form in the orders there is an allegation that the mortgagor has had the bill delivered to him by the mortgagee's solicitors. I think, for reasons which I am now about to state, that that is a material allegation, because there are cases in which the bill which the solicitor delivers to his own client, the mortgagee, is a bill which would be absolutely right as between himself and the mortgagee, though possibly not so between himself and the mortgagor. The mortgagee might have told his solicitor to do certain things; the solicitor might have explained in his ordinary course of duty, "I will do that for you, but recollect if it is done you cannot charge the mortgagor." The mortgagee might say, "Well, I will have it done;" and then the solicitor delivers his bill to the mortgagee which is a proper bill as between the two. That bill is not delivered, I will assume, in point of fact to the mortgagor or his solicitor. Can the mortgagor obtain taxation of it upon an allegation that the bill has been "delivered to him"? In my opinion he

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cannot. I think the delivery of the bill cannot mean a constructive delivery of the bill, and there would be no constructive delivery of the bill in the case which I have just put.

So also in the case of a trustee and *cestuis que trust*, where the trustee employs his own solicitor. That is an ordinary typical case. In that case the trustee may have given special instructions to the solicitor which would warrant him and justify him as between himself and his individual client, the trustee, in making certain charges; upon that the solicitor might draw out his bill and send it in to the trustee, but I think that that could not be called a "delivery." Certainly it cannot be said in point of fact to be a delivery to the *cestuis que trust*; and I think, in the case I am putting, it would not be right to hold that constructively it was a delivery of the bill to the *cestuis que trust*. There may be cases, of course, in which the bill has been paid as was the case in *In re Brown* (1)—a case in which the bill had been paid out of the trust estate. I am not putting that case at all; I am putting the case of the unpaid bill; but I think justice would be done to the solicitor in such a case as that, and that he would be entitled to charge his own individual client with the work which he had done, though he would not have a right to charge and could not charge the same bill as against the estate.

I am not prepared to assent to the proposition of constructive delivery. Of course there may be, upon the facts, such a case as I am going to state, that the bill is sent to the mortgagee simply for the purpose of his handing it over to the mortgagor in such a way that upon the facts the Court might fairly hold that it was a delivery, and upon the particular facts before me there is certainly some ground for saying in the first instance that this bill of Mr. *Robertson's* was sent with that view. But then I must look at all the circumstances of the case, and it appears to me that there was a right, on the part of the solicitor in this case as between himself on the one hand and Mr. *Frere* on the other, to withdraw the bill and to recast it. That is, of course, one of the points in dispute. Where there has been a delivery of a bill the solicitor cannot withdraw it for the

(1) Law Rep. 4 Eq. 464.

purpose of escaping taxation. That is the established law on the matter; and if the bill had been actually delivered to Mr. *Frere*, Mr. *Robertson* could certainly not have withdrawn the bill; but in the circumstances of this case I think the allegation in the petition is not made out in point of fact, and that, as I have explained, it is a material allegation; and therefore, though I wish to make no unnecessary reflection on either side, the case is, in my opinion, one in which I ought first to discharge the order on the ground that there was that mistake in the obligation as to delivery, and secondly, I think, having regard to all the circumstances of the case, and to what I consider the trumpery and trifling nature of the whole thing, the justice of the case will be met if I discharge the order without costs.

Solicitors: *Harold A. Farman; Frere & Co.*

W. C. D.

In re BACON'S SETTLEMENT TRUSTS. HUTTON *v.* ANDERSON.

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[1889 B. 1095.]

Administration—Appointed Funds—Payment of Portion of—Subsequent Loss—Deficiency—Incidence of Loss—Hotchpot.

Trust funds were appointed in pursuance of a power in a deed which contained no hotchpot clause, and certain of the appointees were rightly paid a portion of the sums so appointed to them. Afterwards an unavoidable loss occurred by which the trust funds were rendered insufficient to pay all the appointees in full:—

Held, that the balance of the fund belonged to all the appointees in proportion to the unpaid amounts, and that the payments which had been rightly made to some of the appointees were not to be brought into account as under a hotchpot clause.

ADJOURNED SUMMONS.

Upon the marriage of *Nicholas Bacon* and *Jane Bowker* in 1813 two deeds were executed, both dated the 13th of October, 1813.

By one of such deeds, which comprised the husband's property only, the following trusts were created:—

(1.) Certain lands at *Beccles*, in *Suffolk*, were conveyed to

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trustees in fee upon trust for the husband and wife for their lives and the life of the survivor, and afterwards in trust for the husband in fee.

(2.) A sum of £5000 cash in trust for the husband for life, and after his death, in case there should be no child of the marriage, in trust for the wife for life, and after her death in trust for the husband, and if there should be any such child living at the husband's death (which event happened) then in trust for such children equally, sons taking vested interests at twenty-one, and daughters at that age or marriage, with a power to advance one-half of the expectant shares of survivors in the £5000.

(3.) A sum of £3240 12*s.* 7*d.* Consols in trust for the husband for life, and after his death upon trust for the children of the marriage as he should by deed or will appoint, and in default of appointment in trust for the children of the marriage equally, with a limitation over between them in the case of children dying under twenty-one without leaving issue.

By the other of such deeds comprising the wife's property only, the following trusts were created:—

Two sums of £3000 and £10,000 then invested on certain mortgages, and a sum of £3389 16*s.* 7*d.* Consols, in trust for the husband for life, and after his death for the wife for life, and after the death of the survivor for the children of the marriage as the husband and wife should by deed jointly appoint, and in default of such appointment in trust for the children of the marriage equally, sons taking a vested interest at twenty-one, and daughters at that age or marriage. This deed contained a power of advancement exerciseable during the joint lives of the husband and wife, extending to one-half of the vested or expectant share of any child.

In the year 1819 the lands at *Beccles* were sold for £1800, and that sum was paid to the trustees of the above deeds, and a deed dated the 1st of April, 1819, was executed, declaring the trusts of the £1800 in favour of the husband for life, and after his death for the wife for life, and after her death for the husband absolutely.

There were four children of the marriage only, namely, *Jane Bacon*, afterwards Mrs. *Hutton*, *Anne Elizabeth Bacon*, afterwards Mrs. *Barker*, *Henry Hickman Bacon*, and *Francis Bacon*.

On the 4th of May, 1832, a deed was executed by Mr. and Mrs. *Bacon* which contained, among others, a recital that the aggregate of the trust funds being converted into sterling money would amount to the sum of £26,286, and a further recital which, after stating that the children of the marriage were entitled to the sum of £5000 to be divided between them after the death of Mr. *Bacon*, being £1250 each, proceeded as follows: "and the remaining part of the said sum of £26,286, exclusive of the said sum of £5000, and exclusive of the said sum of £3240 12*s.* 7*d.* £3 per cent. Consolidated Bank Annuities, can be disposed of among the said children in such parts and proportions as the said *Nicholas Bacon* and *Jane* his wife shall jointly direct and appoint, and the said sum of £3240 12*s.* 7*d.* £3 per cent Consolidated Bank Annuities, or the produce thereof, and also the money arising from the said estate at *Beccles*, can be disposed of among the said children in such parts and proportions as the said *Nicholas Bacon* alone shall direct or appoint," and a further recital of a desire to give effect to certain family arrangements, and thereby the following appointments were made in exercise of the joint power of appointment, and of the separate power of appointment which Mr. *Bacon* had, and which appointments took effect upon the trust funds other than the £5000:

(*a.*) Sums amounting together to £5750 were appointed to Mrs. *Hutton*.

(*b.*) A sum of £5750 was appointed to Mrs. *Barker*.

(*c.*) A sum of £9750 was appointed to *Francis Bacon*.

The residue of the trust fund was also appointed, but this appointment was afterwards revoked, and in the result there was no residue.

Mrs. *Hutton*, Mrs. *Barker*, and *Francis Bacon* executed settlements of their respective interests under the above appointments.

The following table shews the sums paid by the trustees for the time being of the settlements of the 13th of October, 1813, and it was admitted and accepted as a fact that it was not possible to trace whether such payments were made out of funds specifically

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representing any particular part of the original trust funds subject to the settlements, and further, that by the year 1832 or earlier the trust funds had been blended together:—

Date of payment.	Amount.	In respect of what fund.	Payee.
June 1, 1832	£3375	The appointed sums amounting to £5750	Mrs. *Hutton's* trustees.
Jan. 25, 1835	£375	Mrs. *Hutton's* share of the £5000	Ditto.
May, 1837 .	£3375	The appointed sum of £5750	Mrs. *Barker's* trustees.
" "	£375	Mrs. *Barker's* share of the £5000	Ditto.
1838	£1250	*Henry Hickman Bacon's* share of the £5000	*H. H. Bacon.*
1863	£875	Balance of Mrs. *Hutton's* share of the £5000	Mrs. *Hutton's* trustees.
"	£875	Balance of Mrs. *Barker's* share of the £5000	Mrs. *Barker's* trustees.
"	£1250	*Francis Bacon's* share of the £5000	*Fras. Bacon.*

In the year 1841 a sum of £12,000 was lent out of the trust funds by the trustees for the time being of the settlements of 1813 upon mortgage of a property called the "*North Fambridge Hall* estate," in *Essex*, and it was believed that the sum of £12,000 was thereby amply secured, which, however, when the mortgage was foreclosed, was found not to be the case. A small part of the land was sold and invested in Consols.

Nicholas Bacon died in 1863, and his widow, *Jane Bacon*, in 1888, whereupon the trust funds remaining in the hands of the present trustees, consisting of £4434 4*s.* 10*d.* Consols and the unsold part of the *North Fambridge Hall* estate, estimated at the value of £7300, making a total (taking Consols at par) of £11,734 4*s.* 10*d.* became divisible.

It appeared from paragraph 12 of the statement of facts, agreed on by all parties, that the sums which would have to be paid in order to give full effect to the appointments under the deed of 1832 of specific sums in favour of Mrs. *Hutton*, Mrs. *Barker*, and *Francis Bacon*, amounted to £14,500, the sum of £2375 being required by Mrs. *Hutton's* trustees, the same amount by Mrs. *Barker's* trustees, and the sum of £9750 by *Francis Bacon's* trustees, and the question having arisen how the estimated deficiency in the trust funds, amounting to £2765 15*s.* 2*d.*, was to be ap-

portioned, the trustees of the settlements of 1813 took out an originating summons, which was adjourned into Court.

Hadley, for the trustees of the settlements of 1813.

Sir *A. Watson*, Q.C., and *E. C. Macnaghten*, for the trustees of Mrs. *Hutton's* settlement:—

The payments were rightly made anterior to the time of the transaction under which the loss occurred, and having been rightly made we cannot be compelled to bring them back again. If there were a hotchpot clause in the deed of 1813 it might be different. The loss must fall on the appointees in the proportions shewn in paragraph 12 of the statement of facts.

Byrne, Q.C., and *Vernon Smith*, for the trustees of Mrs. *Barker's* settlement, in the same interest.

Latham, Q.C., and *T. H. Wright*, for the trustees of *Francis Bacon's* settlement:—

We submit that it would be right and equitable that the payments which have been made should be recalled and brought into account as under a hotchpot clause.

CHITTY, J.:—

The deed of 1832 which recites these two settlements is, in substance, a deed of appointment and family arrangement. The various powers of appointment which were vested in the husband and wife were exercised, and the husband also threw into the common aggregate fund, for the benefit of the children who are the objects of this deed, a sum of £1800, which, subject to certain interests, was his own property. The deed executes the various powers that were subsisting at the time. Besides that there was a fund of £5000 under one of the deeds of settlement which was not subject to any power of appointment at all; and it is recited that the four children were entitled to an equal fourth of that fund. That was not absolutely correct, because their title is dependent on a contingency, but it was the intention of the father, who might have claimed under the contingency, to give that up. Nothing really turns upon that. Now the recitals

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shew that the aggregate value of all the funds as at the date of the deed of 1832 was £26,286, and the deed proceeds upon that footing. It is evident that the parents, the father being, as I have said, the owner of part of the property, and the two parents having the power of appointment that I have mentioned, intended to act under a family arrangement for the benefit of their four children, and to dispose of such parts of the £26,286 as they had power over by virtue of the power of appointment, or by virtue of ownership, between their children. Then striking out the £5000, which the deed shews the parties considered belonged to the children in equal shares, there remains a sum of £21,286, and the appointments, which are money appointments, in the deed amount to the total sum of £21,250, leaving the sum of £5036 to answer the £5000. I strike out the £5000 for the purpose of any question, by saying that the £5000 has been paid and distributed long ago among the four children in the proportions mentioned; and the result is that, according to the view that the parties to the deed took of the facts, there ought to be £21,250 remaining. There is not a sufficient fund, having regard to the balance that remains, to answer that amount. There is a deficiency of something like £3000 in the fund. The aggregate appointment made to each daughter was a sum of £5750.

Payments were made so that each of the daughters has received £3375, and the payments were made before the year 1841. Those payments were made rightly in accordance with the trusts, and, consequently, after they were made, the trust fund belonged to the daughters and the son in the proportions which would correspond with the proportions of the appointment. It is admitted that the payments which were made could not be recalled; but it is suggested that they were not final. It appears to me that they were final payments, and therefore that in the year 1841 (when the investment was made, and lawfully made, though it has resulted unfortunately in a loss) the fund belonged to the appointees in the unpaid proportions, and, that being so, the subsequent loss falls upon them. I think it would be an erroneous principle to say that, for the purpose of the present division, the payments which had been rightly made at the time ought to be recalled or brought into account as in hotchpot. Mr. *Latham*

admits that he has no authority for such a principle, but submits that it would be the right rule, and that it would be an equitable distribution; but it appears to me that when a payment is once made rightly it is final, unless there is a hotchpot clause, and there was no hotchpot clause in this deed. Consequently, from the year 1841 the trust funds have been held upon trust for the appointees in the unpaid proportions. The result, therefore, is that the loss must be borne in the proportions shewn in paragraph 12 of the statement, and the sums which have been rightly paid must not be brought back for the purpose even of an account.

Solicitors: *Oldman & Clabburn; Walker, Martineau, & Co.; Freshfields & Williams.*

G. M.

NORTH, J.

1889
July 4.

In re GOODALL'S TRADE-MARK.

[1888 G. 2519.]

Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 72 (2), *s.* 74 (2)—*Resemblance calculated to deceive—Common Particulars—Right to exclusive Use—Disclaimer—Time.*

Application was made for registration of a trade-mark consisting of the design of a heart in combination with a number of words including "*Parchment Bank,*" the whole inclosed in a rectangular line, there being on the register a trade-mark for the same class of goods consisting of the words "*Pirie's Parchment Bank.*" The application was rejected on the ground of resemblance calculated to deceive.

A disclaimer under sect. 74 (2) of the *Patents, Designs and Trade Marks Act,* 1883, of the right to the exclusive use of a common particular must be made in the application for registration.

THIS was a summons by *Charles Goodall & Son* in the matter of the *Patents, Designs and Trade Marks Act,* 1883, citing *Alexander Pirie & Sons, Limited,* that the Comptroller-General might be directed to proceed with the application of *Charles Goodall & Son,* notwithstanding the opposition of *Alexander Pirie & Sons, Limited.*

Alexander Pirie & Sons, Limited, were the registered owners of a trade-mark consisting of the words "*Pirie's Parchment Bank*" (the words being printed one over the other), for paper and envelopes; the date of their application for registration was the 11th of March, 1885. Their application for registration contained a disclaimer in the following terms: "the Applicants do not claim any right to the exclusive use of either the word *Parchment*' or the word '*Bank,*' appearing in connection with this mark."

The application of Messrs. *Charles Goodall & Son,* made on the 17th of February, 1888, was to register a trade-mark for paper (except paper-hangings) and envelopes, the trade-mark consisting of a design of a heart with (No. 176) inside the heart, the words "*Goodall's Cream-wove Parchment Bank*" above the device of a heart, and the words "*Note Paper, Charles Goodall & Son, London,*" below the device of a heart, the whole being contained in an upright rectangle.

The Applicants' case, as finally made on their affidavits in reply, was that all the words in their trade-mark, except their own name, were words descriptive of the article to which the mark was intended to be applied common to the trade, but no disclaimer had been made in their application of the exclusive right to use such common particulars.

There was affidavit evidence in chief on the part of the Applicants that they had in the year 1883 first applied the two terms "*Parchment*" and "*Bank*" in combination as descriptive of a particular kind of paper, that the words had been long used in the trade separately, "*Parchment*" to denote a hard kind of paper, and "*Bank*" to denote a thin paper, bank notes being printed on thin paper.

There was evidence on the part of the Respondents proving that they had used the mark "*Parchment Bank*" in respect of the paper thus sold in connection with that mark as early as 1880.

E. S. Ford (*Aston*, Q.C., with him), for the Applicants:—

The only part of the Applicants' trade-mark capable of being registered separately as a trade-mark is the design of a heart, the whole of the rest is either descriptive of the article to which the mark is applied or of the name of the maker. But those particulars may, by virtue of sect. 74 (1) (*b*) of the *Patents, Designs and Trade Marks Act*, 1883, form part of a registered trade-mark. The Applicants contend that "*Parchment*" and "*Bank*" being descriptive of particular qualities of paper in common use, "*Parchment Bank*" denotes necessarily a paper having those two qualities, and is a description in common use. Supposing, however, that not to be the case, the whole effect of the Applicants' mark is so different from the Respondents that the use of the two cannot be calculated to deceive.

Cozens-Hardy, Q.C., and *Willis Bund*, for the Respondents:—

The evidence shews that the Respondents' mark "*Parchment Bank*" as a combination of two words is not a descriptive phrase in common use, but has got to denote papers of a particular kind manufactured by or for the Respondents. Even were it other-

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wise the mark is on the register, and the Court will not go behind the register. The Applicants have taken the whole of the Respondents' mark, it is impossible to say that doing so is not calculated to deceive: *In re Horsburgh & Co.'s Application* (1).

The Applicants' own case is that their trade-mark contains common particulars; they ought to have disclaimed the right to exclusive use of those words "with the application," that is to say at the time of the application.

E. S. Ford, in reply:—

The words being descriptive and not distinctive, it is unnecessary to disclaim; but the Applicants are willing to disclaim, and will give an undertaking to do so. There is no reason why the disclaimer should not be made at any time, at any rate before registration. The question at what time the disclaimer must be sent in was discussed, but not settled, in the case of *In re Swift Specific Company's Trade-mark* (2), before Mr. Justice *Stirling*, though the remarks of the Judge tend to the opinion that the disclaimer may be made afterwards.

NORTH, J.:—

In this case I do not see my way to accede to the application that is made. The Applicants seek to have a trade-mark registered containing within a rectangular border "*Goodall's Cream-wove Parchment Bank*, No. 176, *Note Paper, Charles Goodall & Son, London.*" The Respondents oppose on the ground that they have already registered "*Pirie's Parchment Bank*," *Pirie* being the name of the person who has registered it. Therefore, that being the man's name, "*Parchment Bank*" is the only other part of the mark. That is the most important part of *Pirie's* trade-mark, that trade-mark is on the register, and there is no application to take it off.

Now the present application by *Goodall* is to put on the register also the trade-mark which I have just referred to. That contains this very material part of *Pirie's* mark, "*Parchment Bank.*" "*Goodall's Cream-wove Note Paper*" are not words that are

(1) 53 L. J. (Ch.) 237. (2) 6 Rep. Pat. Cas. 352.

material, they are merely descriptive beyond all question. All that is left is this, there is "*Parchment Bank*," and there is "No. 176." It seems to me impossible to say that when what is *Pirie's* whole trade-mark excepting his own name is proposed to be incorporated into the Applicants' trade-mark, it is not a case which comes within the 72nd section of the Act, which requires that the Comptroller "shall not register with respect to the same goods or description of goods a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive."

[His Lordship on the evidence considered it was proved that the Respondents had been the first to use the term "*Parchment Bank*" as describing a particular kind of paper; they having done so in the year 1880. He proceeded:—]

Then the attempt in reply is to set up that this is common to the trade; that it is used by many people. That may be the fact. I do not say it is not. That evidence is uncontradicted, and as far as I can judge from that, it seems, and it probably is the fact, that it has been used by other persons, as common in the trade. But it is quite clear to me that it is used in the Respondents' trade-mark as a distinctive mark. And in my opinion that brings it exactly within the 74th section of the Act, which says: "(1) Nothing in this Act shall be construed to prevent the Comptroller entering on the register, in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade-mark:—(*a*) In the case of an application for registration of a trade-mark used before the 13th day of August, 1875,—Any distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade in the goods with respect to which the application is made; (*b*) In the case of an application for registration of a trade-mark not used before the 13th day of August, 1875,—Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made; (2) The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of

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the same, and a copy of the disclaimer shall be entered on the register."

Looking at the application here, I do not find this is an application of the sort which is referred to in that section. I do not see how it can be said that the requirement of the Act that the disclaimer shall be in the application can be waived by anything that I do.

Mr. Justice *Stirling* had a similar matter before him the other day, and he did not decide it. If it is important for me to decide it now, I hold that, for the application to be made under that section, it must comply with the requirements of the section, and if so the offer to disclaim must be made in the application, which is not the case here.

Under these circumstances I refuse the application.

Solicitors for the Applicants: *Robbins, Billing, & Co.*
Solicitors for the Respondents: *Paddison, Son, & Fullilove.*

D. P.

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In re PARRY.
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[1889 P. 535.]

Will—Bequest of Annuity—Administration of Estate—Security for Annuity—Right of Annuitant to have Estate realized.

When a testator bequeaths legacies and annuities, and then gives the residue of his property, after payment of his debts, funeral and testamentary expenses, legacies and annuities, the annuitants are not entitled as a matter of right to have the estate converted, and a sum sufficient to answer the annuity invested in such securities as the Court would approve for the investment of funds under its control; but they are entitled to have the annuities sufficiently secured, for instance, by a mortgage of real estate of the testator.

A testator, after bequeathing £100 to each of his two executors, directed his executors to pay to his father and his sisters life annuities amounting together to £700. And he declared that the residue of his property, after payment of his debts and funeral and testamentary expenses, and the legacies and annuities thereinbefore directed to be paid, should be divided amongst his next-of-kin and heiresses, as though he had died intestate with respect thereto. The testator's estate consisted mainly of two freehold theatres and two leasehold theatres. The freehold theatres were

respectively let on lease, at rents respectively of £700 and £1317, and produced respectively (after deducting outgoings) net incomes of £629 and £888. The testator was the original lessee of the leasehold theatres at the respective rents of £750 and £25, for the respective terms of eighty years and seventy-one years. Of the eighty years nine years had expired, and of the seventy-one years twenty-six years had expired. Both these theatres were underlet at largely improved rents, and they respectively produced net profit incomes of £2109 and £186. Each of the leasehold theatres, and one of the freehold theatres, was subject to a mortgage, the mortgage debts together amounting to £12,500. The testator's debts (other than the mortgage debts on the theatres) and his funeral and testamentary expenses and pecuniary legacies had been all paid out of his personal estate, and there remained a balance of £2000 in the hands of the surviving executor. The annuities had been punctually paid since the testator's death. The annuitants claimed to be entitled to have the leasehold theatres sold, and the mortgage debts paid out of the proceeds of sale, and that a sufficient sum should then be invested, in the mode in which cash under the control of the Court would be invested, to provide for the payment of the annuities. The residuary legatees proposed that the executors should raise by mortgage of one of the leasehold theatres such a sum (as with the £2000 in the executors' hands) would be sufficient to discharge the testator's mortgage debts, and that the annuities should be secured by a first mortgage on the two freehold theatres, the charge of the annuities on the residue of the testator's estate (subject to the new mortgage to be created) remaining undisturbed, with liberty to the annuitants to apply to the Court for additional or other security, in case the annuities, or any of them, should fall into arrear; and that, after payment of the interest on the new mortgage and the annuities, the residue of the income of the estate should be divided between the residuary legatees:—

Held, on the authority of *Re Potter* (1), *Webber* v. *Webber* (2), and *King* v. *Malcott* (3), that the annuitants were not entitled to have the leasehold theatres sold, but that, the estate having been cleared by the payment of the testator's debts, and funeral and testamentary expenses, the annuitants were only entitled to have the annuities sufficiently secured, and that the proposed security would be sufficient.

ORIGINATING SUMMONS, asking for the determination (without administration) of certain questions relating to the estate of *Sefton Henry Parry*, who died on the 18th of December, 1887.

By his will, dated the 4th of May, 1887, *Parry* appointed *John Leak* and *C. H. Hodgson* executors, and he bequeathed to each of his executors £100. He directed his executors to pay to his father and mother an annuity of £300, and to continue such

(1) 50 L. T. (N.S.) 8. (2) 1 S. & S. 311.
(3) 9 Hare, 692.

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annuity to the survivor of them for his or her life, as the case might be. The testator bequeathed to his mother for her life a separate additional annuity of £100. And he directed his executors to pay an annuity of £100 to each of his four sisters, *Emily, Katharine, Florence* and *Edith;* and, in the event of the death of any one or more of his sisters, to give the survivors the benefit of their deceased sister or sisters' annuity, so that in the end the last surviving sister might enjoy the income of the four. And the testator also directed that the annuity of £300, thereinbefore bequeathed to his father and mother, should go to his sisters or sister, as the case might be, on the death of the survivor of his father and mother, so that in fact the surviving sister, in the event of her outliving the parents, might become entitled for her life to £700 per annum. The testator added, "This will is merely made by me in consequence of the intestacy created by my recent marriage, and to provide for my parents and my sisters should my death occur, it being my intention, after due consideration of the subject, to make a will which shall deal with my entire estate. Meanwhile, should I die before signing such will, I declare that the residue of my property, after payment of my debts and funeral and testamentary expenses, and the legacies and annuities hereinbefore directed to be paid, shall be divided among my next-of-kin and heiresses as though I had died intestate with respect thereto."

The testator's real and personal estate was of considerable value. It consisted, *inter alia*, of four theatres. One of them was the *Avenue Theatre* in *London*. The testator held this theatre under a lease made to himself, at an annual rent of £750, for a term of eighty years from the 29th of September, 1880. This theatre had been underlet by the testator, for twenty-one years from the 1st of March, 1882, determinable at the end of the first fourteen years, at an annual rent of £3276. The property was subject to a mortgage for £5000. The net profit arising from the theatre, after deducting the ground rent, the interest on the mortgage, and other outgoings, was £2108 17*s.* 6*d.* On the underlease by the testator two stalls and a private box in the theatre were reserved to him, and they produced an average net annual income of about £350.

Another of the four theatres was the *Greenwich Theatre.* The testator held this theatre under a lease made to himself, at an annual rent of £25, for a term of seventy-one years from the 28th of December, 1863. This theatre had been underlet by the testator, for a term of fourteen years, from the 18th of August, 1884, determinable at the end of the first seven years, at an annual rent of £350. This theatre was subject to a mortgage for £2000, and the net profit arising from it, after deducting the ground rent, the interest on the mortgage, and other outgoings, was £186 8*s.* 4*d.*

Another of the four theatres was the *Hull Theatre,* the freehold of which belonged to the testator. It was subject to a mortgage for £5500. It was let on lease for seven or fourteen years, at a rent of £1317 6*s.* 8*d.*, and, after deducting the interest on the mortgage and other outgoings, it produced a net annual income of £888 11*s.* 8*d.*

The fourth theatre was the *Southampton Theatre,* the freehold of which belonged to the testator. It was let on agreement for a lease at a rent of £700, and, after deducting outgoings, it produced a net annual income of £629 11*s.* 6*d.*

The testator also possessed some freehold and leasehold houses of comparatively small value.

At the time of the testator's death his mother was dead, his father was aged about eighty-two, and his four sisters were of ages varying from fifty-eight to forty-one.

Since the testator's death the annuities bequeathed by his will had been punctually paid.

The Plaintiff in the summons was Mrs. *Scott* (one of the testator's two daughters). The Defendants were *Leak,* the surviving executor; the trustees of the marriage settlement of Mrs. *Anderson,* the testator's other daughter; Mr. and Mrs. *Anderson*; the testator's father; and the testator's four sisters.

The testator's two daughters were his co-heiresses and his sole next-of-kin.

The Plaintiff asked for the determination, without administration of the testator's estate—(1) That the executor might be at liberty to raise by way of mortgage of the *Avenue Theatre* such a sum as (with the sum of £2000 in the hands of the executor

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would be sufficient to discharge the mortgage debts of the testator; (2) That the annuities bequeathed by the will should be secured by a first mortgage on the *Southampton* and *Hull Theatres*, the charge of the annuities on the residue of the testator's estate (subject to the mortgage to be created as aforesaid) remaining undisturbed, with liberty to the annuitants to apply to the Court for additional or other securities, in case the annuities, or any of them, should fall into arrear; and that, after payment of the interest on the said mortgage and of the said annuities, the residue of the annual income of the testator's estate should be paid as it accrued, as to one moiety to the Plaintiff, and as to the other moiety to the trustees of Mrs. *Anderson's* settlement.

At the time when the summons was issued the testator's personal estate had been got in and administered, with the exception of a balance of £2000 in the hands of the executor, and his leasehold properties. The testator's debts (except his mortgage debts) and his funeral and testamentary expenses had all been paid.

With respect to the *Avenue Theatre*, Mr. *Skitt*, a surveyor, deposed: "It is situated in one of the best quarters of *London*, and is very prosperous, and attended by fashionable audiences. The underlease has recently been sold for a large sum of money, and I consider the rent of £3276 is very amply secured. In my opinion, the theatre would, having regard to the present rental, beyond all doubt, sell for at least £25,680, but the property having increased in value, it is, in my opinion, underlet by at least £500 per annum, and if properly rented would fetch at least £30,000." With regard to the *Greenwich Theatre*, the same surveyor said: "I think this property would realize at least £2600. The theatre is doing very well, with very respectable audiences, and serves an area containing about 50,000 people."

With respect to the *Hull Theatre*, Mr. *W. H. Wellsted*, a surveyor at *Hull*, deposed: "The theatre is situated in one of the best parts of the town of *Hull*. It has always been very well attended by a good class of audience. It is the only theatre in the town, the population of which is over 200,000, and will, in my opinion, always command a good tenant. It is, in my opinion, certain to realize, if sold, at least the sum of £15,000.

I consider the theatre a good property to hold, as the position, accommodation, and equipment are good, and competition is very improbable."

With respect to the *Southampton Theatre*, Mr. *W. B. Hill*, a surveyor at *Southampton*, deposed: "The theatre is situated in one of the best parts of the town of *Southampton*. It has always been very well attended by a good class audience. It is the only theatre in the town, the population of which, with the immediate suburbs, amounts to some 100,000 people, and will, in my opinion, always command a good tenant. It is my opinion that the theatre would realize, if sold, the sum of £8000, or thereabouts. I consider the theatre a good property to hold, as the position, accommodation, and equipment are so good that competition is very improbable."

The testator's father and four sisters desired that the leasehold theatres should be sold, and that out of the proceeds the testator's mortgage debts should be discharged, and that the surplus should be invested in investments in which cash under the control of the Court could be invested, and that the whole income of the estate should then be applied, first, in payment of the annuities, and, next, in the investment of the balance in approved securities, after making such allowance as the Court might think reasonable to the testator's two daughters.

Cozens-Hardy, Q.C., and *H. M. Williams*, for the Plaintiff:—

The annuitants have no absolute right to have the testator's estate converted. They are only entitled to have the annuities properly secured, and the proposed mortgage of the freehold property will give them ample security. The annuities are a charge on the whole estate, and it is not proposed to release the leaseholds from liability. It is not the practice of the Court to assist by the appointment of a receiver an annuitant who can help himself by distress, especially if the annuity is not in arrear: *Sollory* v. *Leaver* (1); *Kelsey* v. *Kelsey* (2); *Norman* v. *Johnson* (3); *Burrell* v. *Delevante* (4). The annuities being expressly charged on the testator's real estate, a title could not be

(1) Law Rep. 9 Eq. 22.
(2) Ibid. 17 Eq. 495.
(3) 29 Beav. 77.
(4) 30 Beav. 550.

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made to a purchaser of the real estate, except subject to the charge in favour of the annuitants.

Napier Higgins, Q.C., and *Haldane*, for the Defendants *Leak*, Mr. and Mrs. *Anderson*, and the trustees of their settlement:—

If a testator gives an annuity *simpliciter*, it may be that the annuitant is entitled to have some security set apart to meet it. But this is a question of intention. If a testator bequeaths an annuity by way of charge, that is an indication of an intention that the security for the annuity is to be that property which is charged, and nothing else: *Re Potter* (1).

Everitt, Q.C., and *Ingle Joyce*, for the Annuitants:—

The will shews that the primary object of the testator was to provide for his parents and his sisters. The annuitants are entitled to have the estate administered and cleared. There are mortgage debts still unpaid. The cases cited do not apply. An annuity is a legacy. In the present case there is no trust to pay the annuities out of any particular property. When there is, as here, merely a bequest of annuities and a residuary gift, the annuitants are entitled to have all the residuary personalty realized, and the annuities provided for by setting apart a sufficient investment. The annuities ought not to be left a charge on leasehold property which is subject to heavy liabilities.

In *Burrell* v. *Delevante* (2) the annuity was not created by the will of the testator; it was one which the testator had agreed to pay on the marriage of his daughter; it was a debt contracted by the testator. So long as the annuity was not in arrear there was no debt due. And the will created a trust of a particular property. *Norman* v. *Johnson* (3) was a similar case. In *Kelsey* v. *Kelsey* (4) there was a bequest of specific leasehold property, upon condition that the legatee should out of the rents and profits thereof pay an annuity. *Re Potter* turned upon special circumstances.

That the estate ought to be realized and a fund set apart to

(1) 50 L. T. (N.S.) 8.
(2) 30 Beav. 550.
(3) 29 Beav. 77.
(4) Law Rep. 17 Eq. 495.

answer the annuities is shewn by *Slanning* v. *Style* (1); *Fryer* v. *Buttar* (2); *Taylor* v. *Taylor* (3); *Elliott* v. *Dearsley* (4). The residuary legatees are not entitled to have the leasehold property kept *in specie.*

Cozens-Hardy, in reply:—

The residues of the realty and the personalty do not, as in *Elliott* v. *Dearsley,* go to different persons. *Slanning* v. *Style* and *Fryer* v. *Buttar* are distinguishable from the present case. *Kelsey* v. *Kelsey* (5) is a plain authority in favour of the residuary legatees.

NORTH, J. (after stating the provisions of the testator's will, and the other facts above mentioned), continued:—

The right of the annuitants is plain to have the estate cleared and ascertained; they have a right, I think, to see that the testator's debts are paid off and discharged. When the mortgage has been dealt with in the way proposed, all the testator's debts will have been paid and discharged, subject to this observation that, as regards the two leasehold theatres, the testator is the original lessee, and, therefore, his estate must remain liable for the payment of the rents reserved by, and the performance of the lessees' covenants contained in, those leases respectively.

Now it is proposed that the estate shall be further cleared for the benefit of the annuitants, by selling the leases. But that will not really clear the estate any more than it will be cleared, so soon as the mortgage to which I have referred to is made. The liability of the testator's estate in respect of the leases must necessarily continue until the leases have run out, or a surrender has been accepted by the landlords. That liability must continue, and, although, no doubt, the executor may be relieved from liability in respect of it, the liability of the estate must necessarily continue. It is impossible by anything which is done now to get rid of that liability, for no one has suggested that any application has been made to the lessors to release the testator's estate. This, of course, could only be done on terms.

(1) 3 P. Wms. 334.
(2) 8 Sim. 442.
(3) 8 Hare, 120, 129.
(4) 16 Ch. D. 322.
(5) Law Rep. 17 Eq. 495.

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Now the question is, whether, under these circumstances, the annuitants, who are entitled in law to a number of contingent legacies, payable at the dates at which the successive instalments of their annuities become payable, are entitled to have the estate further cleared by the sale of these leasehold properties, or whether the proposal that security should be given for their annuities is one which I ought to adopt, it being obviously for the interest of the residuary legatees, who are absolutely entitled to the residue, subject to the annuities, to continue to receive the rents which these theatres produce. I say it is obviously for their interest; they say it is, and one can quite understand that it may be so.

Have then the annuitants a right to have these leaseholds sold? In my opinion, they have not. Several cases were cited by the Plaintiff's counsel, and I am not prepared to say that Mr. *Everitt's* comments on those cases, other than *Re Potter* (1), are not well founded. There are circumstances which distinguish those cases to some extent from the present. Then Mr. *Everitt* referred to two other cases as being authorities in his favour, but I do not think I can derive much assistance from either of them. They are both very briefly reported. The first is *Slanning* v. *Style* (2). In that case the testator "being seised in fee of some real estate, particularly a farm of £200 per annum (which he kept in his own hands), and possessed of a very plentiful personal estate, devised to his wife £30 per annum for her life, charged on his real estate, and devised also to his wife an annuity of £40 per annum for the life of her mother, charged upon the residue of his personal estate, payable quarterly," and, subject to that, the residue of the personal estate was given to the testator's three sisters, who were married ladies, in equal shares. The question raised was, as to the security which ought to be given for the annuity of £40. Nothing appears to have been said about the annuity of £30, which was charged on the real estate,—whether it was considered hopeless to ask for security for that annuity, or whether the parties were satisfied with the security, I do not know. Security was asked for the £40 annuity, and the suggestion was, that, "as the personal estate was liable to be in a short time wasted (possibly by the husbands of the wives to whom the

(1) 50 L. T. (N.S.) 8. (2) 3 P. Wms. 334.

testator gave the residue)," therefore, security ought to be given for the annuity. And it is to be noticed what was asked for (1): "Therefore it was insisted, that the husbands of the wives should give some security for the payment of the same." I do not find that the Court was asked to decide that the annuitant was entitled to have the property realized and invested in Consols, or something equivalent. Then Lord Chancellor *Talbot* said (2): "Generally speaking, where the testator thinks fit to repose a trust, in such case, until some breach of that trust be shewn, or at least a tendency thereto, the Court will continue to intrust the same hand, without calling for any other security, than what the testator has required; but here the testator himself has charged the residue of his personal estate with this annuity, which he plainly intended should be duly and quarterly paid; and, as this estate appears to consist of some bonds or securities, let such part thereof be brought before the Master as may be sufficient to preserve this annuity of £40 per annum for the widow." That, as it seems to me, if it was a decision at all, was merely a decision that some bonds or securities, forming part of the testator's personal estate, were to be set aside for the purpose of securing the annuity. It certainly does not go the length of shewing, that an annuitant is entitled to have the personal estate converted, and an amount sufficient to secure the annuity invested in Consols or other approved security. No conversion was directed, and, looking at the form of the relief which was asked, I cannot see that the Lord Chancellor decided that point one way or the other. Therefore, I cannot say that that case assists me at all in deciding the present case.

Then *Fryer* v. *Buttar* (3) was referred to. But that, again, is an extremely meagre report, and, although I accept implicitly the decision, I am not satisfied how it was arrived at. The testator gave several legacies, and then he gave an annuity of £40, payable out of his stock of Long Annuities, during the life of his servant *Mary Watson*. Then he made a similar bequest to *Mary Clarke*, another servant, and he added, "in case of the death of the one or the other, the said *Mary Watson* or *Mary Clarke*, my will

(1) 3 P. Wms. 335. (2) 3 P. Wms. 336.
(3) 8 Sim. 442.

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is that the survivor shall enjoy the annuity of the other as well as her own, that is, £80 a year for her, the survivor's, life; and, at the death of the survivor, the principal out of which the whole annuity of £80 arose, to go to my nearest of kin, who may be then living. These annuities of £80 are to be secured, at the decease of my wife, on my stock of Long Annuities, and made payable to the said *Mary Watson* and *Mary Clarke* half-yearly." Then the residue was given to two persons mentioned. "The testator died possessed of £509 Long Annuities, and the question was, whether £80 of the Long Annuities ought to be set apart to answer the annuities given to *Mary Watson* and *Mary Clarke,* in which case they would run the risk of the Long Annuities expiring in their lifetimes; or whether their annuities were a charge upon the whole of the testator's Long Annuities." I take it, therefore, without knowing the dates, that the Long Annuities would very possibly expire before the deaths of the annuitants, and, if so, the appropriation of £80 Long Annuities would clearly not be sufficient to provide with certainty for the payment of the annuities. Then "the Vice-Chancellor held, (1) that a sum of £3 per cent. stock, producing £80 a year, ought to be purchased with money to be raised by sale of a sufficient part of the Long Annuities; and that the dividends of such stock ought to be paid to the annuitants and to the survivor of them; and that the remainder of the Long Annuities fell into the testator's residuary estate," and the residuary legatees were entitled to it under the will. There, again, I do not understand what the grounds were upon which the decision was arrived at. It was obvious that something more must be done than the setting apart of £80 Long Annuities. Moreover, the annuity was to be "payable out of the stock of Long Annuities," and whether there was an arrangement between the parties, or a decision hostile to either party, the report does not shew. That case, therefore, does not give me much help in arriving at the principle which is to be followed in other cases, although it shews what the learned Judge thought it right to do in the particular case with which he had to deal.

Now in the present case it is proposed, first of all, to appropriate the freehold theatres, free from any other charge, to the

(1) 8 Sim. 443.

purpose of paying the annuities. These freeholds produce at present a surplus income of £1500 a year, available to meet the £700 annuities. But that is not quite a fair statement of the case, because, in arriving at the £1500, the interest, amounting to £247 10*s.*, on the mortgage for £5500 has been deducted. But, as that mortgage will have been paid off from other sources, the clear income will be £247 10*s.* more, that is over £1700 a year. Now, it is true that that income is produced by two theatres, and, that a theatre is a somewhat speculative investment; but the experience of recent years, as appears by the affidavits, has shewn, that a theatre is a very profitable investment. One of these theatres was built by the testator out of his own money, and the result is, that from the land for which he pays a small rent, he receives a very much larger rent.

Supposing that one of these theatres, say the theatre at *Southampton*, were unlet for a time, there would still be more than £1100 a year available to meet the £700. If, on the other hand, the theatre at *Hull* were unlet for a time, the income from the other theatre alone, available to pay the annuities, would be £629, which would be rather too little. But, of course, the other theatre itself would remain, even if it were not let, and upon the evidence I come to the conclusion that it is a very valuable property, although it might not fetch so much as if it were subject to a lease. I do not know whether it would or not, but sometimes, if property is improving in value, it might be all the better for the owner that it was not subject to a lease. But it seems to me what is proposed will give an ample security for the annuities.

Is there, then, any authority which justifies me in so treating it? I think in *Re Potter* (1) which was very like the present case, the Court, in principle, took just the same view; and, although I feel some doubt whether I should have applied the principle in the way in which it was then applied, if I had been deciding that case, yet that does not affect the principle on which the Vice-Chancellor proceeded. There are, however, two other cases which appear to me material on this point. The first is *Webber* v. *Webber* (2). In that case the testator "gave to each of his

(1) 50 L. T. (N S.) 8. (2) 1 S. & S. 311.

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daughters, *Sarah* and *Mary Elizabeth*, the sum of £10,000 on their respective marriages. And, in case their mother should die before they were married, then after her decease he gave them an annuity of £1200, to be equally divided between them, so long as they both continued unmarried; and, after the marriage or death of either of them, after the death of their mother, he gave to the other, in lieu of her moiety of the annuity of £1200, an annuity of £800, so long as she continued unmarried. *Sarah*, one of the daughters, married in the testator's lifetime. In November, 1796, the testator died, leaving *Sarah Webber*, his widow, and his two daughters, surviving. A suit having been instituted for the administration of the testator's personal estate, and the Master having reported that all the testator's debts and legacies, except the £10,000 given to *M. E. Webber*, had been paid; and that £16,000 Bank Three per cent. Annuities, part of the funds in the cause, were, according to the market price of such annuities on the day mentioned in his report, of the value of £10,000, that sum was carried over to Miss *Webber's* account, subject to the contingencies mentioned in the will concerning her legacy. On the 6th of May, 1819, *Sarah Webber*, the widow, died; upon which Miss *Webber* presented a petition, insisting that, in the events that had happened, she was entitled, under her father's will, to an annuity of £800. Upon this petition an order was made, directing two sums of £13,333 6*s.* 8*d.* Bank Annuities, part of the funds in the cause, to be appropriated to answer the annuity. Under these circumstances a petition was presented by some of the other parties to the suit, submitting that, as, Miss *Webber* could not be entitled both to the legacy and the annuity, the two sums of £13,333 6*s.* 8*d.* Bank Annuities would at all times be a sufficient fund to answer the legacy as well as the annuity; and therefore praying that the Accountant-General might be ordered to carry over the £16,000 Bank Annuities from Miss *Webber's* account to the credit of the cause generally; and that it might be declared that the two sums of £13,333 6*s.* 8*d.* Bank Annuities should be a fund for answering, not only the annuity of £800, but also the legacy of £10,000."

Now, note the Vice-Chancellor's decision (1): "This legatee

(1) 1 S. & S. 312.

being entitled to receive a certain sum in money when the event of her marriage happens, her legacy is not capable of being secured by the present appropriation of any sum of stock. Let the residuary legatee receive the whole fund in Court upon giving security, to the satisfaction of the Master, for the payment of the legacy if the event happens. It may be secured upon land if he has land, or by a loan of money upon land." The whole fund, therefore, was ordered to be paid out upon that security being given.

That, as it seems to me, is a very strong authority in support of the view that the annuitants are not entitled to anything more than security for what is to come to them. I do not find that that case has ever been dissented from, and, indeed, it was expressly approved of by Lord Justice *Turner*, when Vice-Chancellor, in *King* v. *Malcott* (1). In that case a lessor claimed security out of the estate of his deceased lessee for the payment of rent to accrue due, and the performance of the lessee's covenants, the rent having always been duly paid down to the death of the lessee, and there not having been any breach of the covenants. The Vice-Chancellor said (2): "The case was likened in the argument to the case of contingent legatees. It was said, that such legatees, and who, being volunteers, are not to be more favoured than creditors, have the right of retaining and impounding the assets of their testator. But every legatee has a present right, and the fund is impounded to answer the demand which exists, and is created by the will. The argument overlooks the difference between a contingent debt and a contingent legacy. A contingent legacy is separated from the assets, or secured, because it is a sum which in any event is certainly payable to some person, though it may be uncertain to whom it will become payable. But a contingent debt is a sum which it is altogether doubtful whether it will ever be taken out of the assets." I do not quite understand the distinction there taken between a debt and a legacy. I should have thought it was equally doubtful whether a contingent legacy would ever be taken out of the assets. However, the Vice-Chancellor goes on (and this is the important passage): "Even in the case of a contingent legacy, the legatee

(1) 9 Hare, 692. (2) 9 Hare, 695.

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is not, as it was assumed at the bar, entitled to have a sum actually retained or appropriated, to answer the legacy when the contingency arises. That is not an unusual way of providing for the legacy, but it is a matter of arrangement, not of right; and in strictness the legatee is only entitled to have security for the payment of the sum, should the contingency arise. The case of *Webber* v. *Webber* (1) illustrates the distinction."

These two cases seem to me to be very clear authorities on the point, and therefore I have only to see that a proper security is given for the payment of the annuities. I think the annuitants are entitled to have such a security as will make it practically certain that the annuities will be fully paid. Of course, the appropriation of part of the assets will not release the rest of the estate. Recourse might still be had, if necessary, to the rest of the estate. But, in my opinion, the proposed appropriation of a mortgage upon the freehold estate, notwithstanding that it is theatrical property, will be an amply sufficient security.

But the residuary legatees have, in fact, offered more, and I see no reason why the annuitants should be deprived of what is offered to them. Therefore, I propose to make an order in the terms of the summons.

I should add that one very important feature in the case is the fact that the annuities have all been paid down to the present day; there is not a penny in arrear. If the annuities had fallen into arrear, the result might have been very different.

Solicitors: *A. C. Spaull*; *Collyer-Bristow & Co.*; *Parker, Garrett & Parker.*

W. L. C.

(1) 1 S. & S. 311.

In re BARTON-UPON-HUMBER AND DISTRICT WATER COMPANY.

NORTH, J.
1889
July 20.

Company—Winding-up—Jurisdiction—Undertaking for Public Benefit—Statutory Powers.

The Court has jurisdiction to make an order for the winding-up of a water company, incorporated by registration under the *Companies Acts*, upon which powers for the public benefit have been conferred by a provisional order of the Board of Trade (made under the *Gas and Water Works Facilities Act*, 1870, and afterwards confirmed by a special Act), though it might not be possible to sell the undertaking and property of the company without the authority of an Act of Parliament.

Blaker v. *Herts and Essex Waterworks Company* (1) distinguished.

PETITION by a shareholder for the winding-up of the above company compulsorily.

The company was registered under the *Companies Acts*, with limited liability, on the 27th of May, 1885, its objects, as defined by the memorandum of association, being to construct and maintain waterworks, with all necessary appliances, and to supply water to the parish of *Barton-upon-Humber*, and other neighbouring parishes, in *Lincolnshire*. The nominal capital of the company was £25,000, in 2500 shares of £10 each. Only 919 shares had been issued, and upon these shares £1536 had been paid up. The articles of association authorized the company to borrow £6250 by means of debentures, and debentures for that amount had been issued. At the time of the registration of the company application was being made to Parliament, by the signatories of the memorandum of association, for an Act to confirm a provisional order, which had been made in 1885 by the Board of Trade, under the *Gas and Water Works Facilities Act*, 1870 (33 & 34 Vict. c. 70), and the Act 48 & 49 Vict. c. lxv. was afterwards passed on the 16th of July, 1885. The provisional order which was thus confirmed provided that the company should be "the undertakers" for the purposes of the order. The order authorized the construction of the waterworks by the undertakers, and

(1) 41 Ch. D. 399.

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conferred on them various powers for that purpose, and it incorporated the provisions of the *Lands Clauses Acts*, with certain exceptions, and of the *Waterworks Clauses Acts*, 1847 and 1863. The petitioner alleged that the directors of the company had improperly issued duplicate debentures in excess of the authorized amount, the money raised by means of them not having been applied for the purposes of the company, and that the directors, who had become reduced to two in number, had induced some of the shareholders to transfer their shares to one of the directors for a nominal consideration, and that these transfers were not made *bonâ fide*. It was alleged that the director to whom these transfers had been made was a man of no means, and that, if the original holders of the shares which had been so transferred to him could be made liable for the amounts still uncalled on their shares, there would be more than enough capital to complete the company's works. The works were to a great extent constructed, but they had been at a standstill for some months for want of money. One shareholder had taken out a summons to have his name removed from the register, on grounds which would apply to many other shareholders. The petitioner alleged that the provisional order (the date of which he did not know) provided that the works were to be completed within the time prescribed by sect. 11 of the Act of 1870 (that is, within three years from the date of the provisional order), and that a question would arise whether the company was in a legal position to go on with the works and complete them in a way to make the property of the company of any use. Unless the alleged transfers of shares were declared invalid the company was commercially insolvent, and under the circumstances it was just and equitable, and in the interest of the shareholders, that the company should be wound up by the Court.

Emden, for the Petitioner:—

The company do not appear, and ample grounds are shewn for making a winding-up order. The only question to be submitted to the Court is, whether there is jurisdiction to wind up a company which has statutory powers for the benefit of the public. It may be that no assets can be realized, unless an Act can be

obtained to authorize the sale of the company's undertaking In *Blaker* v. *Herts and Essex Waterworks Company* (1) Mr. Justice *Kay* refused, at the instance of debenture-holders of a company similar to the present company, to direct a sale, or to appoint a manager, of the undertaking of the company, on the ground that the undertaking was for the benefit of the public. But in *In re Bradford Navigation Company* (2) an order was made to wind up a canal company incorporated by Act of Parliament, and the order was affirmed on appeal (3). Similar orders have been made in other cases. If a winding-up order is made, it may be possible to reconstruct the company.

NORTH, J.:—

I do not see any difficulty in making a winding-up order. The petition is presented by a shareholder, and he alleges that the waterworks are not, and cannot now be, completed, because there are no funds available for the purpose. As the works are not yet completed, it follows that they have not been opened for public use. The Petitioner says that the directors have misapplied funds belonging to the company, and that, if proceedings are taken against them, these moneys may be recovered for the company. It has been very properly suggested by the Petitioner's counsel, that, as it is probable that the undertaking and property of the company cannot be sold without obtaining an Act of Parliament to authorize the sale, no assets might be available in the winding-up: and reference was made to the recent case, *Blaker* v. *Herts and Essex Waterworks Company*, before Mr. Justice *Kay*. In that case the action was brought by the debenture-holders of a company incorporated with limited liability, which had statutory powers to construct waterworks and supply water within a specified district. The company had made default in payment of the principal and interest of the debentures, and the plaintiffs claimed a declaration that they were entitled to a charge on the undertaking and property of the company (present and future) to secure the principal and interest due on the debentures; an account of what was due on the debentures; that the

(1) 41 Ch. D. 399. (2) Law Rep. 10 Eq. 331.
(3) Law Rep. 5 Ch. 600.

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undertaking and property of the company comprised in the debentures might be sold as a going concern; or, in the alternative, foreclosure, and the appointment of a receiver and manager until sale or foreclosure. Mr. Justice *Kay* declared the plaintiffs entitled to a charge upon the company's undertaking, and directed an inquiry who were the debenture-holders and what was due to each of them, and he appointed a receiver, but declined to order a sale of the undertaking or to appoint a manager. He acted apparently upon the principle laid down in the well-known case, *Gardner* v. *London, Chatham, and Dover Railway Company* (1). He did not dismiss the action, but he made an order in the terms which I have mentioned. The present case is one in which a winding-up order ought certainly to be made, unless the fact that the company's undertaking is for the carrying out of a public object is a sufficient reason for not making it. In my opinion that is not a sufficient reason. If I do not make a winding-up order all the money which has been expended on the works will have been wasted, nothing can be done to complete the works and the persons who are alleged to have misapplied the moneys of the company cannot be compelled to make them good. It is possible that I may not be able to order a sale of the company's undertaking and property. I am not considering that question now. It may be necessary to obtain an Act of Parliament to authorize a sale of the undertaking; if it is necessary, I do not apprehend that there will be any difficulty in obtaining it. The order which I am now asked to make will be equivalent to the judgment which Mr. Justice *Kay* pronounced in the case to which I have referred. By appointing an official liquidator I shall not be taking the management of the undertaking out of the hands of the company; I shall be appointing an officer of the Court to carry on the undertaking for the company and in the interest of the shareholders. There are several cases in which similar orders have been made, such as *In re Bradford Navigation Company* (2); *In re Wey and Arun Junction Canal Company* (3); and *In re Isle of Wight Ferry Company* (4). I do not forget that in *In re The Company or Fraternity of Free Fishermen*

(1) Law Rep. 2 Ch. 201.
(2) Ibid. 10 Eq. 331.
(3) Law Rep. 4 Eq. 197.
(4) 2 H. & M. 597.

of Faversham (1) the Court of Appeal refused to make a winding-up order. But there the company was a very peculiar one, as there was a right of fishery in the individual members of the company; and the ground of the decision was, that no good could result from the making of a winding-up order. If I thought that in the present case, I should refuse to make the order. I have not forgotten the observations made by Lord Justice *Fry* at the latter part of his judgment. He said (2): "One word only with regard to the last point to which I adverted, which was the recital in the Act that this fishery is for the public benefit. I am bound to say that I should pause long before I was a party to the destruction, by winding-up, of an undertaking which the Legislature had solemnly declared to be of great benefit to the public as well as to the company itself. I will make this further observation, that the statute in which that recital is contained seems to me to carry evidence of the anxiety of the Legislature that this corporation should not be put an end to. It gave a power to the corporation to borrow money and to mortgage, assign, and charge the fishery and the profits arising therefrom, and it gave a particular form of charge, and that was a charge of interest at a certain rate to the debenture-holders until the principal should be paid. It contained no stipulation with regard to the repayment of the principal, and no time at which it was to be repaid. Then it went on to provide that, in the event of default of payment of interest some person might be appointed to receive the whole or such part of the proceeds of the fishery and the money to be received for the sale of any oysters or oyster-brood, as were liable to pay such interest. There was, therefore, no charge given for the *corpus* of the moneys advanced on the fishery. The mode in which the right of the debenture-holders was worked out was by their obtaining a receiver of the profits of the fishery. That looks to me very much as though the Legislature, whilst authorizing the corporation to borrow for its purposes, at the same time was desirous that the corporate property should never cease to be vested in the corporation: for, although the profits might be received by a receiver and distributed amongst the debenture-holders so long as there was default in payment, yet

(1) 36 Ch. D. 329. (2) 36 Ch. D. 347.

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there was no power of sale given, no right to sell the fishery, no right against the fishery in any other way than by obtaining a receiver of profits. I doubt, therefore, whether the Legislature ever intended that the property so vested in the corporation should be put an end to by the claims of creditors." In that case the company had been carrying on their business for a very long time, and there was no reason for putting an end to it. In the present case, assuming that the paramount intention of the Legislature was the benefit of the public, the public cannot obtain any benefit from the company as matters now stand. In my opinion, it will be for the benefit of the public that a winding-up order should be made with a view to the company being reconstructed and carrying on the undertaking itself, or to the carrying on of the undertaking by some other company. In making a winding-up order, I think that I shall not be going contrary to the recent decision of Mr. Justice *Kay*, and shall be following the other cases to which I have referred in which similar orders have been made.

Solicitors: *Hughes, Hooker & Co.*

W. L. C.

NORTH, J.
1889
July 15, 16, 17, 18, 22.

In re PRYTHERCH.
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[1887 P. 2958.]

Will—Construction—"Younger Children"—Mortgagor and Mortgagee—Mortgagee in Possession—Right to give up Possession—Right to appointment of Receiver—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8 [*Revised Ed. Statutes, vol. xvii., p.* 78].

A testator devised real estate on trust after the death of his wife in strict settlement on his four sons, *A.*, *B.*, *C.*, and *D.*, and their issue male successively. He bequeathed a legacy of £14,000 after the death of his wife to be paid to his "younger children," namely *B.*, *C.*, *D.*, *E.*, *F.*, *G.*, *H.*, *K.*, and *L.* (the six latter being his daughters), in equal shares, so that the share of each of his said younger children should be absolutely vested at twenty-one, whether the preceding trusts should be determined or not. *A.* and *B.* died in the lifetime of the testator's widow without issue male.

C. attained twenty-one in the lifetime of *B.*, and on the death of the widow became tenant for life under the will of the real estate:—

Held, that he was entitled to a share in the legacy of £14,000.

Under sub-sect. 8 of sect. 25 of the *Judicature Act*, 1873, the Court has a discretion as to the appointment of a receiver.

A receiver may be appointed at the instance of a legal mortgagee, but he has no absolute right to a receiver.

The power given by sub-sect. 8 of sect. 25 can be exercised at the trial of an action, as well as upon an interlocutory application.

A mortgagee who has once taken possession of the mortgaged property cannot relinquish possession at his pleasure; having once assumed the responsibilities attaching to a mortgagee in possession, he cannot at his own pleasure get rid of them, and as a general rule the Court will not by appointing a receiver assist him to do so.

Mason v. *Westoby* (1) considered.

DANIEL PRYTHERCH, by his will, devised his real estate on trust "in the first place, with or out of the rents and profits of the said devised estates, or by mortgaging or charging the same, or a competent part or parts thereof, to raise, in aid of the residue of my personal estate (if insufficient), so much money as shall be requisite to satisfy the pecuniary legacy of £14,000 hereinafter bequeathed for the benefit of my younger children, together with the expenses of executing the trust, and to apply the money to be so raised accordingly, and subject thereto in trust," for his eldest son, *Daniel Dalton Prytherch*, for life, with remainder to his first and other sons in tail male; with remainder to the testator's other three sons and their sons in tail male in succession; with remainder to the testator's six daughters as tenants in common.

The testator bequeathed his personal estate on trust to pay the income to his wife during her life, and after her death, "as to the same trust funds, moneys, stock, funds, and securities, and as to the moneys to rise out of my real estate, if requisite, as aforesaid, upon trust thereout to pay unto my younger children, namely, the said *James Dalton Prytherch, Edward Dalton Prytherch, John Dalton Prytherch, Caroline Aylife Harriet Dalton Prytherch, Frances Sarah Dalton Prytherch, Augusta Octavia Dalton Prytherch, Adelaide Dalton Prytherch, Agnes Dalton Prytherch*, and *Blanche Dalton Prytherch*, a legacy of £14,000 sterling, in equal shares, with interest after the rate of £4 per centum per annum from the decease of my said wife until payment thereof; and

(1) 32 Ch. D. 206.

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so that the share or interest of each of them, my said younger children, shall be absolutely vested at his or her age of twenty-one years, whether the preceding trust shall be determined or not, and so that the share or shares, as well original as accruing, of each and every of my said younger children or child dying under the age of twenty-one years of and in the said legacy shall accrue to the others or other of them my said younger children, and, if more than one, in equal shares, and to be vested as aforesaid. I direct my trustees for the time being of this my will, after the death of my said wife, to apply the whole or any part of the income of the contingent share to which each of my said younger children shall be entitled in the said legacy towards the maintenance, education, or bringing up of such child, and shall accumulate the unapplied income and add the accumulations to the share whence the same shall have arisen. And I declare that the trustees for the time being of my will shall have power in their discretion after the death of my said wife, or in her lifetime with her consent in writing, to raise by such means as they shall judge expedient out of my trust property any part not exceeding one half part of the capital of the contingent share of each younger child of mine in the said legacy, and apply the same for his or her advancement in life."

The testator died in December, 1854.

His daughters, *Frances Sarah Dalton Prytherch* and *Blanche Dalton Prytherch*, died respectively infants and without having been married, in the years 1855 and 1856. The testator's eldest son, *Daniel Dalton Prytherch*, died in August, 1857, having attained twenty-one, but without having been married. The testator's second son, *James Dalton Prytherch*, died in March, 1872, leaving issue one daughter only, the Plaintiff in this action. The testator's fourth son, *John Dalton Prytherch*, died in November, 1874, without issue. The testator's widow died in December, 1875. The testator's third son, *Edward Dalton Prytherch*, died on the 15th of August, 1885, leaving issue a daughter only; he attained twenty-one in 1863.

This was an action by *Mina Lucy Prytherch*, the only child of the testator's second son, claiming as heiress of deceased daughters of the testator to be entitled to three-sixth shares of his real

estate. The trustees of the will, and *Bishop*, a mortgagee of real estate of the testator (under the power to raise the £14,000), and persons other than the Plaintiff interested in the real estate were made Defendants. *Bishop* had entered into possession. The statement of claim alleged that the trustees had raised sums in excess of the amount which they were entitled to raise, and claimed (*inter alia*) a declaration that the trustees were jointly and severally liable to make good any loss occasioned to the Plaintiff and the other persons entitled to the testator's real estate by raising money in excess of the power, and that the Defendant *Bishop* was not entitled to rank as mortgagee in respect of such excess; an account of what was due for principal and interest on the mortgage and properly chargeable against the Plaintiff and her co-tenants in common in fee, and that in taking the account *Bishop* might be charged as mortgagee in possession from the 15th of August, 1885; and that the Plaintiff might be at liberty to redeem the real estate on payment into Court of the amount which should be certified to be due and properly chargeable as aforesaid.

The trustees had in distributing the legacy of £14,000 acted on the assumption that the testator's third son, *Edward Dalton Prytherch*, by reason of his becoming tenant for life in possession of the real estate under the will on the death of the widow, was disentitled to a share in the legacy, which was, therefore, distributable in sixth shares, instead of sevenths.

The Defendant *Bishop* delivered a defence and counter-claim. By his counter-claim he claimed an account of what was due under or by virtue of his mortgage; payment of the amount found due, and in default foreclosure or sale; and the appointment of a receiver.

At the trial of the action the question whether *Edward Dalton Prytherch* was or was not entitled to a share in the legacy of £14,000 was argued.

Napier Higgins, Q.C., and *C. Walker*, for the Plaintiff, and

Upjohn; and *Waggett*; for Defendants in the same interest:—

An equal share in the legacy, to be absolutely vested on his

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attaining twenty-one, was given to *Edward Dalton Prytherch.* The legacy did become absolutely vested when he attained twenty-one. He was then a younger son. Reading the whole will, the gift was to him as an individual designated, not as a younger child: and if it were a gift to a younger child, when he attained twenty-one, he took a vested interest that could not be divested.

Everitt, Q.C., and *E. Ford*, for the Defendant *Bishop.*

Cozens-Hardy, Q.C., and *O. Leigh Clare*, for the surviving trustee of the will and the representatives of a deceased trustee:—

The rule of construction put by the Court upon gifts by persons *in loco parentis* to younger children is that a child who, though an eldest child, does not take the family estate by reason of her being a daughter, is to participate; and, on the contrary, a son who, though a younger child at the time of the description, subsequently becomes the holder of the family estate, is not to take a share. It matters not that he is named in the gift, or that it is expressed to be vested at a time before the legacy is payable; in the latter case it will be divested if he succeed before the time of payment: *Beale* v. *Beale* (1); *Chadwick* v. *Doleman* (2); *Collingwood* v. *Stanhope* (3); *Broadmead* v. *Wood* (4); *Lord Teynham* v. *Webb* (5); *Savage* v. *Carroll* (6).

Jermyn v. *Fellows* (7), a case on the construction of an Act of Parliament, is, at first sight, an exception, but in that case the authority of *Chadwick* v. *Doleman* was fully recognised. The words of the operative part of the Act were considered to be plain, and the case has never been treated as affecting the rule.

The terms of the power of advancement shew that younger children who have attained twenty-one before the period of distribution have only a contingent interest.

1889. July 17. NORTH, J.:—

The question is whether the gift in favour of the testator's "younger children," naming them, operated to give the son

(1) 1 P. Wms. 244.
(2) 2 Vern. 528.
(3) Law Rep. 4 H. L. 43, 52.
(4) 1 Bro. C. C. 77.
(5) 2 Ves. Sen. 198.
(6) 1 Ball & B. 265.
(7) Cas. t. Tal. 93.

Edward a share. In my opinion it did, because the trust is to pay "to my younger children," naming them, *Edward* being one, a legacy of £14,000 sterling in equal shares with interest at 4 per cent. "from the death of my wife until payment thereof;" and then come these words, "and so that the share or interest of each of them, my said younger children, shall be absolutely vested at his or her age of twenty-one years whether the preceding trusts shall be determined or not." Now, looking at those words, it seems to me impossible to say that *Edward* did not take an absolute vested interest at the time when he attained twenty-one. At that time, beyond all question, he was a "younger child" in every sense of the words, because he had an elder brother then living. Now, *Edward* attained twenty-one in the year 1863. At that time, therefore, on my construction of the will, he had an absolute vested share although the preceding trust had not determined. Then the words that follow are these: "And so that the share or shares, as well original as accruing, of each and every my said younger children dying under the age of twenty-one years in the legacy"—that is to say, before the time of his attaining an absolutely vested interest—"shall accrue to the other or others of my said younger children, and if more than one in equal shares to be vested as aforesaid." That seems to me to contrast most strongly with the previous clause, and shews exactly what is meant by being absolutely vested and what is not absolutely vested. It shews that if a child dies under twenty-one the share is not absolutely vested, but it is to accrue to the others; whereas on the other hand, if he does attain twenty-one, then there is no provision whatever for its accruing to the others, but it is absolutely vested in that child whether the preceding trust is determined or not.

The contention is that the trust for the younger children is, according to some principle adopted by the Court of Equity, not an absolute gift, whatever the testator says, but a conditional gift, and it is to the younger children conditional upon the named persons being alive and existing as younger children at the time when the preceding trust does determine. Whatever the construction may be, in the absence of express words laying down the rule; it is not the construction put by the Courts upon such

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wills in the teeth of the instrument itself. If it were an absolute rule of law it must have effect given to it, notwithstanding anything which the testator has said to the contrary. But it is only a rule of construction, and it must give way to the meaning of the will or settlement, having regard to the language in which it is expressed.

Now the language to which I have already referred seems to me to shew most clearly that a son who attained twenty-one was to have an absolute vested interest which was not to go over, independently of the question whether he was or was not living at the time when the preceding trust determined, and to construe this will as I have been asked to construe it would be not only to supply words which are not to be found in it, but, it would be to make that contingent which the will declares shall be absolutely vested,—it would be to make the share which is said to be absolutely vested go over upon the happening of a contingency which is not provided for by the will, although another contingency is expressly referred to in the will as that upon which the share is to go over.

Then, again, when we come to the further gift there is a direction that the trustees for the time being of the will shall have power in their discretion "after the death of my wife, or in her lifetime with her consent in writing, to raise by such means as they shall judge expedient out of my trust property any part not exceeding one half part of the capital of the contingent share of each younger child of mine in the said legacy, and apply the same for his or her advancement in life." Now, that is to be either in the lifetime of the wife with her consent, or after her death. Of course it might apply after her death by reason of a person still only having a contingent share in consequence of not having attained twenty-one years; but it is said that it applies to the case of a share which was contingent, although a party had attained twenty-one and, therefore, had an absolute interest under the terms of the will, by reason of a possibility of the person who took it being a younger child who might not survive the period of distribution. That, in my opinion, is not the meaning of the clause. I think the reference there to raising one half of the capital of the contingent

share refers to the share which was contingent by reason of the time for absolute vesting not having arrived. In other words, it would apply to the case of a person who was under twenty-one at the time at which the advancement had to be made; but, in my opinion, if an advancement was made under that clause in respect of a son who was a younger son at the time at which it was made, the advance would be a perfectly good advance notwithstanding that he died under twenty-one, or whether before or after he had attained twenty-one he did or did not become the eldest son. In my opinion the words here are far too strong to enable me to say that the share which the testator said was absolutely vested at a given time is, by construction of law, not absolutely vested at that time but at a different time, which had not arrived till twelve years or so after the son attained twenty-one years. No doubt it may be very important to give effect to the view that younger children are intended to be persons who do not take the estate itself. On the other hand, it is very important for persons, and the law recognizes the fact, that the shares are treated as vesting at the earliest time at which consistently with the terms of the instrument giving them they can be held to vest; and, when the testator says the share of the legacy here is to be absolutely vested in a son at twenty-one, they are words so strong as, in my opinion, to prevent my applying any rule of construction which might be applicable to this case in the face of express words to the contrary.

I do not intend to refer in detail to the various cases which have been cited. It is sufficient to say that in none of them do I find any such rule laid down as prevents me from giving that which I hold to be the true construction to the present will. The only case I need refer to is *Collingwood* v. *Stanhope* (1), in which Mr. *Everitt* says that Lord *Hatherley* laid down a rule of law. This is the important passage, after stating the rule (2): "It has been further held that the Court will not, notwithstanding very strong words (as there have been in some cases) in the settlement to the contrary, hold the portions to be indefeasibly vested in the children in such a manner as to allow, on the one hand, a double portion to be given to one child, or, on the other hand, to allow any child

(1) Law Rep. 4 H. L. 43. (2) Law Rep. 4 H. L. 53.

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to be excluded." The language used in *Collingwood* v. *Stanhope* (1) itself, in my opinion, is not anywhere nearly as strong as the words which I have now to construe. If I found that the language used here was identical with that with respect to which Lord *Hatherley* and other learned Law Lords had laid down the law, I might have felt bound to follow the rule laid down by them as to a clause indistinguishable from the present; but I do not find anything in that case which can be compared in strength with the language which I have now to deal with, and I feel that the clause which I have to construe is so strong, that I must give effect to it, and, if I were not to do so I should be allowing what is called a rule of law to displace what I hold to be an express direction by the testator, given in language the meaning of which is not capable of dispute.

I shall hold, therefore, that the legacy is divisible into sevenths.

D. P.

July 22. The question of the right of the Defendant *Bishop* to have a receiver appointed, as asked by his counter-claim, was argued.

Everitt, Q.C., and *E. Ford*, for the Defendant *Bishop*:—

A mortgagee who has taken possession is entitled to go out of possession at any time, and to have a receiver appointed: *Judicature Act*, 1873, s. 25, sub-s. 8; *Tillett* v. *Nixon* (2); *Mason* v. *Westoby* (3). Since the *Judicature Act* a legal mortgagee can have a receiver appointed.

Napier Higgins, Q.C., and *C. Walker*, for the Plaintiff:—

In both the cases cited the interest on the mortgage was in arrear when the mortgagee went into possession, and the mortgagor was in pecuniary difficulties. In *Mason* v. *Westoby* the circumstances were peculiar, and the second and third mortgagees supported the application of the first mortgagee for the appointment of a receiver. Sect. 19, sub-sect. 1, cl. iii., of the *Conveyancing and Law of Property Act*, 1881, enables a mortgagee to appoint a receiver himself, and sect. 24 imposes restrictions on the exercise

(1) Law Rep. 4 H. L. 43. (2) 25 Ch. D. 238.
(3) 32 Ch. D. 206.

of the power. This shews what the Legislature thought to be fair grounds for the appointment of a receiver.

Everitt, in reply:—

I have been unable to find any authority on the question whether a mortgagee in possession has a right simply to go out of possession. In *Mason* v. *Westoby* (1) the mortgagee who was in possession had a surplus of rents and profits in his hands. The action was for sale or foreclosure, and the plaintiff moved for and obtained the appointment of a receiver. Vice-Chancellor *Bacon* said that the plaintiff was entitled to be relieved by the appointment of a receiver from the responsibilities of a mortgagee in possession.

NORTH, J.:—

Mr. *Charles Bishop* was for a time receiver in possession for some other persons who were mortgagees, but he ceased to fill that character when those persons were no longer mortgagees, and he himself became mortgagee in possession. From that time his character of receiver merged in that of mortgagee in possession. From that time forth he has continued to be mortgagee in possession. It is not altogether immaterial that he had entered into possession and receipt of the rents and profits so far back as 1878, although that was by reason of his having purchased the interest of the tenant for life, who died in 1885. Thus, for eleven years past, he has voluntarily been in possession of the property, receiving the rents, and, during part of the time, either as mortgagee in possession himself or as receiver for other mortgagees, has been filling the position of mortgagee in possession. Now it is proposed that he should be allowed to give up possession, and that a receiver should be appointed. As regards giving up possession, I am not aware that a mortgagee, who has exercised his right of taking possession of the mortgaged property, has any right to give up that possession whenever he likes. He may take possession whenever he pleases, and if, when he has elected to take possession he may give it up again, it is clear that he may take possession again, and, then, if the

(1) 32 Ch. D. 206.

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contention is well founded, he may give it up again. I have never heard it suggested, nor do I think it is the law, that a mortgagee is entitled to go into and out of possession whenever he likes. In my opinion, when he once takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform the duty, and he cannot when he pleases elect to give it up. I am satisfied that, if there were any such right, some authority to that effect would have been produced. None, however, has been cited to me, nor have I been able to find such authority referred to in any of the text-books which I have looked at myself.

Then it is said, that at any rate the mortgagee has a right to have a receiver appointed. I do not see how a man who is himself in possession can have a right to have a receiver appointed to assist him in the performance of his duty. I can understand that a mortgagee who is not in possession may be entitled to have a receiver appointed by the Court to receive the rents of the property. Under the old law a legal mortgagee could never obtain that assistance from the Court. His duty was to take possession himself if he wanted it, and he was not entitled to have another person put in to act for him, when he could take possession for himself. If, however, there was a prior mortgage, so that he had no legal right to the property, in that case he could get a receiver appointed. No doubt, since the *Judicature Act*, the Court does sometimes appoint a receiver at the instance of a legal mortgagee, though he could take possession for himself; but it only does that because the Legislature has, by sub-sect. 8 of sect. 25 of the Act of 1873, enacted that "a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." No doubt the Court has as large a power at the trial of an action as it would have upon an interlocutory application, and those words were added there only for the purpose of making it clear that the enactment applies to interlocutory applications. Now the Court has power to appoint a receiver when it shall appear to it to be "just or convenient" to do so. The section says that a receiver "may"—not "shall"—be appointed when it is "just or convenient" to do so.

Would it be just or convenient to do so in the present case? I can see no reason why a mortgagee, who has voluntarily remained in possession so long, should say at the last moment that he will give up possession, and put the mortgagors to the expense of a receivership. Of course, if there is a foreclosure, the receiver's costs, coming out of his receipts, will be paid in effect by the mortgagee, and, if he had been content to bear those costs in any event, whether the mortgagor should be foreclosed or the mortgage should be redeemed, I should be disposed to assist him by appointing a receiver. But it does not seem to me that it would be either "just or convenient" that the mortgagors should now have the expense of a receiver put upon them. In my opinion, I have a discretion in the matter, which I ought to exercise by not making the appointment. As regards *Mason* v. *Westoby* (1), I have no doubt that in that case the circumstances were such as to make it "just and convenient" to appoint a receiver; the judgment shews clearly that that was the view of the learned Vice-Chancellor. But I do not regard that case as an authority for saying that the word "may" in sect. 8 is to be read "must," and that the words "just or convenient" are to be ignored altogether. Notwithstanding that decision, I think I have a discretion given to me by the statute, and I do not see any reason for exercising that discretion in the present case by appointing a receiver. I will, however, the mortgagors not objecting, appoint *Bishop* himself receiver, without salary and without security.

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The judgment, as settled after discussion, appointed the Defendant *Bishop* receiver of the rents and profits of the mortgaged property, without salary and without security. And it directed that an account should be taken against him as mortgagee in possession, from the date of the death of *Edward Dalton Prytherch* down to the date of the judgment.

Solicitors: *Berkeley & Calcott*, agents for *C. E. Morris, Carmarthen; Clarke, Rawlins & Co.*, agents for *Barker, Morris & Barker, Carmarthen; Burton, Yeates & Co.*, agents for *Rowland Browne, Carmarthen; Tucker & Lake*, agents for *C. Bishop, Llandovery; Crowdy, Son, & Tarry.*

(1) 32 Ch. D. 206.

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Aug. 8.

HENDON LOCAL BOARD *v.* POUNCE.

[1889 H. 2776.]

Local Board—Bye-laws—Validity—"New Street"—Width—"Construction"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157 [*Revised Ed. Statutes, vol. xvii., p.* 569].

The bye-laws of a local board provided: (4.) "Every person who shall lay out a new street shall so lay out such street that the width thereof shall be forty feet at the least." (6.) "Every person who shall construct a new street shall provide at one end, at least, of such street an entrance of a width equal to the width of such street, and open from the ground upwards":—

Held, that the 6th bye-law was *intrà vires* and reasonable, and that it prevented a landowner from "constructing" a new street upon his land until he had provided an "entrance" to the new street of the specified width, even though that entrance could only be made upon the land of another person over whom he had no control:—

Held also, that the "construction" of a new street included the building of the houses abutting on it, and, consequently, that the landowner could not, until an adequate entrance had been provided, erect houses abutting on the proposed new street.

MOTION by the Plaintiffs for an injunction.

By the writ the Plaintiffs claimed an injunction to restrain the Defendants, *J. H. Pounce* and *H. Cooper*, from constructing a new street, called *Ravenshurst Avenue*, at *Hendon*, in *Middlesex*, within the Plaintiffs' district, until an entrance to such new street should have been provided of a width equal to the width of such new street, and to restrain the Defendant *Cooper* from building any house upon the lands fronting, adjoining, or abutting upon the new street, or any part thereof, until such entrance as aforesaid had been provided.

The Plaintiffs were the urban sanitary authority for their district.

The Defendant *Pounce* was the owner in fee of a field on the south side of an old road called *Church Lane*, which ran east and west. Immediately abutting on the south side of *Church Lane* was a row of houses, called *Market Place*, each house having a garden or yard in its rear. Behind these gardens was *Pounce's*

field. An old lane ran between some of the houses in *Market Place*, from north to south, to a gate which led into the *Pounce's* field, and this lane also gave access to the back premises of the houses in *Market Place*. This old lane was between eighty and one hundred feet in length, and from seventeen to twenty feet in width. *Pounce's* field was bounded on the east by land belonging to one *J. B. Mathews*, and on the south by an old footway, called *Chapel Walk*, which ran east and west, and which also formed the southern boundary of *Mathews'* land. *Mathews* had, with the sanction of the Plaintiffs, constructed a new street, called *John Street*, which ran out of *Church Lane*, at a point east of *Pounce's* land, from north to south, and was terminated by *Chapel Walk*. On the west side of *John Street* houses had been built, the back gardens of which abutted on *Pounce's* field. The Plaintiffs, when they sanctioned the construction of *John Street* on the 22nd of October, 1881, required that *Mathews* should leave a strip of land forty feet in width, on the west side of *John Street* and at the south end thereof (adjoining *Chapel Walk*), unbuilt upon, so that it might be possible to form a street of forty feet in width communicating with *Pounce's* land, in case that land should at any time thereafter be built upon.

The Plaintiffs' bye-laws, which had been allowed by the Local Government Board, contained the following provisions:—

(1.) "In the construction of the bye-laws relating to new streets and buildings the following words and expressions shall have the meanings hereinafter respectively assigned to them, unless such meanings be repugnant to or inconsistent with the context or subject-matter in which such words or expressions occur; that is to say (*inter alia*):—

"'The Sanitary Authority,' means the local board for the district of *Hendon*, acting as the urban sanitary authority:

"'Width,' applied to a new street, means the whole extent of space intended to be used, or laid out so as to admit of being used, as a public way, exclusive of any steps or projections therein, and measured at right angles to the course or direction, or intended course or direction, of such street."

4. "Every person who shall lay out a new street shall so lay

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out such street that the width thereof shall be *forty feet* at the least."

6. "Every person who shall construct a new street shall provide at one end, at least, of such street an entrance of a width equal to the width of such street, and open from the ground upwards."

On the 17th of December, 1886, *Pounce* applied to the Plaintiffs for permission to lay out a new street, to be called *Ravenshurst Avenue,* extending south from the old lane which led from *Church Lane* into his field, across his field, up to *Chapel Walk,* in accordance with a plan which he deposited with his application. This plan shewed that the new street was to be forty feet in width, but that the only approach from the north end of it into *Church Lane* was by means of the old lane, which, as already stated, did not exceed twenty feet in width. The new street was to be terminated at its south end by *Chapel Walk,* thus forming a *cul de sac.* The Plaintiffs rejected this application, on the ground that the plan did not comply with their bye-laws. *Pounce* then submitted an amended plan, which shewed an extension of the proposed new street at its southern end, at right angles to its original direction, running from west to east, so that, if it were continued across the vacant strip of land belonging to *Mathews* at the south end of *John Street,* it would be connected with, and have an entrance into, that end of *John Street.* This proposed easterly extension of *Ravenshurst Avenue* was shewn on the amended plan as of the width of forty feet. It could not, however, be carried out so as to join *John Street* without the consent of *Mathews.* The amended application was referred to a committee of the Plaintiff board. The committee reported as follows: "Your committee, having fully considered the application and the minutes of the board of the 22nd of October, 1881, with reference to *John Street,* whereby it was stipulated that the two plots in *John Street* nearest *Chapel Walk* should be left vacant, in order to provide for any future new road down *Chapel Walk* of a width of forty feet required by the bye-laws, and, as Mr. *Pounce's* application proposes to construct a portion of such new street over the before-mentioned vacant plots into his proposed new street (*Ravenshurst Avenue*), your

committee consider that, if the proposed new street is laid out and constructed, as shewn on the plans deposited by Mr. *Pounce*, for the whole length between *Church Lane* and *John Street*, and of a width of forty feet from the old road at *Church Lane* end to *John Street*, and before any houses are allowed to be built in such street, your committee would recommend the board to assent to Mr. *Pounce's* application." On the 17th of January, 1887, this report was approved and adopted by the board, and it was resolved "that Mr. *Pounce's* plan be passed, subject to the conditions mentioned in the report." After this *Pounce* constructed sewers and drains along his proposed new street, and he metalled the roadway and curbed and paved the footpaths of that part of the street which adjoined the old lane leading into *Church Lane*. He entered into an agreement with *Cooper* to let to him the land abutting on the new street for building purposes, and *Cooper* applied to the Plaintiffs for their approval of plans for the erection of forty houses. The new street had not, however, been yet connected with *John Street*, from which its east end was separated by a fence six feet high, which surrounded the strip of vacant land belonging to *Mathews*. The board rejected *Cooper's* application, on the ground that the proposed new street had not been completed in accordance with the resolution of the 17th of January, 1887, or made in accordance with the bye-laws of the board. Notwithstanding this rejection *Cooper*, with the assent of *Pounce*, commenced building some houses upon the land which *Pounce* had agreed to let to him, and, as he persisted in doing so after notice from the board to both the Defendants to put a stop to the operations, this action was commenced.

The Plaintiffs now moved for an injunction till the trial, in the terms of the claim made by the writ.

Cozens-Hardy, Q.C., *Yate Lee*, and *R. Cunningham Glen*, for the Plaintiffs:—

The Defendants are clearly violating the 6th bye-law; they are not entitled to construct the new street at all until an "entrance" to it of the same width as the street has been provided. The building of houses abutting on the street is part of

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the "construction" of the street: *Baker* v. *Mayor of Portsmouth* (1).

Everitt, Q.C., and *Vernon R. Smith*, for the Defendants:—

The bye-laws must be construed reasonably, and so that they may not be *ultrà vires*. They will not be valid unless they are within the power conferred by sect. 157 (2) of the *Public Health Act*, 1875. The sixth bye-law properly construed applies only to that which the person who is constructing the new street is doing, or can do, upon his own land; it does not compel him to provide an entrance to the new street upon land which belongs to another person over whom he has no control. If he makes the new street of the prescribed width throughout its whole extent upon his own land, he has done all which is required by the bye-law. If the bye-law means that the new street must not be approached by means of an existing old road which is of less width than forty feet, it is *ultrà vires* and unreasonable, and on both those grounds invalid. The point decided in *Baker* v. *Mayor of Portsmouth* was an entirely different one—viz., that the power of a local board to make provision for the pulling down of buildings erected in contravention of their bye-laws was not confined to bye-laws relating to structure, but extended to bye-laws as to notice and deposit of plans.

NORTH, J.:—

I think the case is very clear upon the construction of these bye-laws.

[His Lordship stated the facts, and continued:—] If the Defendants had done what the board assented to when they approved conditionally of the new plan, there would have been an entrance forty feet wide at the end of *Ravenshurst Avenue* adjoining *John Street*, which would have been acceptable to the local board, and their approval would have been given. But the Defendants cannot take any advantage of that, because that entrance has not

(1) 3 Ex. D. 4, 157.

(2) Sect. 157 provides that "every urban authority may make bye-laws with respect to the following matters (that is to say): *inter alia* (1) with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof."

yet been made; therefore the time has not come at which the Defendants can rely on the conditional approval so given by the local board. At present the Defendants have merely commenced making the new road called *Ravenshurst Avenue* at the northern end, and the rest of it is not made at all. It is, as I understand, marked out, some sods may have been taken off, but nothing like constructing a road has taken place, except at the northern end. The road has only been constructed at the northern end, and, according to the plans which have been handed to me, some houses, about ten in number, have been, or are going to be, built, on one side at least, if not on both sides, of the road. That cannot be justified by what it is proposed to do at the end of the new road adjoining *John Street*, inasmuch as it has not yet been done. The only question is, whether it can be justified by what has been done at the north end of *Ravenshurst Avenue*. [His Lordship referred to sect. 157 of the *Public Health Act*, 1875, and the bye-laws 4 and 6, and continued:—] The 4th bye-law applies to *Ravenshurst Avenue*, and makes it essential that it shall be at least forty feet wide from one end to the other. Then the 6th bye-law provides for something else. It does not refer to the new street, because the whole width of the new street from beginning to end is already fixed by the 4th bye-law at forty feet, and the 6th bye-law provides that there is to be "an entrance" forty feet wide. That does not mean that a part of the new street is to be forty feet wide, because the whole street is to be of that width, but it means that the mode of access to the new street so made is to be of a width equal to the width of the new street. The object of that is plain. It would be of no use to have a new street forty feet wide throughout, if at the end of that street the only access were by a narrow space fifteen or twenty feet wide. Therefore, it is required that the person who proposes to construct a new street shall, before he can be allowed to make it, provide an entrance to it of equal width with the street. It appears to me, therefore, that, so long as the entrance from *Ravenshurst Avenue* to *John Street* is not provided, the Defendants are not entitled to make any part of their new street until they have provided an entrance to it at the north end forty feet wide. In my opinion, therefore, they are wrong in attempting to

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proceed with the erection of houses abutting upon the proposed new street, until an entrance to it forty feet wide has been provided. One way of doing this is by making the new street through to *John Street*, and, if they had done that, there would have been at one end an entrance forty feet wide provided, and they could go on with the construction of the new street; but, if they do not choose to do that, then they must provide an adequate entrance at the other end, by enlarging the present narrow entrance to the proper width.

It is said that it would be unreasonable to suppose that the bye-law compels them to do this on someone else's land. It does not do anything of the sort. As I construe it, all that the bye-law does is this—it prevents the landowner from building upon his own land until he has provided an entrance to it of the specified width; he may be able to provide the entrance over another man's land by arrangement with him; but, if he cannot provide the requisite entrance, either over his own land or by arrangement with some other landowner, then the only result is that he cannot utilise his own land by constructing a new street and building houses upon it. The bye-law does not require him to do anything upon another man's land; it only says, you cannot construct a new street on your own land unless you provide an adequate entrance to it.

That disposes of the first point raised by Mr. *Everitt*, that the Defendants have complied with the bye-laws because this new street is forty feet wide. In my view they have complied with the 4th bye-law, but they have not complied with the 6th, because they have not provided an entrance to the new street of the same width as the street itself.

Then it is said that this bye-law is invalid—that it is *ultrà vires*. Of course, if it were, it could not be enforced. But, in my opinion, it is not *ultrà vires*, and I think that is decided by *Baker* v. *Mayor of Portsmouth* (1). The question there arose upon a similar bye-law made by a local board under sect. 34 of the *Local Government Act* of 1858, and it was decided that the power given by that Act to make bye-laws with respect to the level, width, and construction of new streets included not merely the

(1) 3 Ex. D. 157.

making of the street proper, that is, the roadway, including the sewers and footpaths, but also the construction of the houses on each side, and the gardens attached to them. It is clear, therefore, that this bye-law is not *ultrà vires*.

Then it is said that the bye-law is unreasonable, and therefore invalid. It is very difficult to see how it can be unreasonable if it is *intrà vires*; still the point may be taken. But, in my opinion, there is nothing unreasonable in it. It would be absurd to say that the board were right in insisting on the road being forty feet wide, if they are not to gain the advantages which a road of that width would give. The object is, for sanitary reasons, to admit light and air, to allow the wind to sweep freely along the road. A road of that width is much more healthy than a narrower one, and, of course, the benefits of a road of that width will be only partially secured if it is closed in at each end, or at any rate at one end, by an entrance so narrow that a free draught of air through it would be impeded. I can see nothing unreasonable in saying that the person who constructs the new road shall provide an entrance as wide as the road itself, and it is quite clear that in the present case the board are not acting unreasonably, because they are willing to allow the road to be made with an entrance to *John Street*. In my opinion, the Plaintiffs are in the right, and I think the bye-law applies to the buildings on each side of the new street, as well as to the street or roadway itself. The injunction, therefore, must go against the builder, as well as against the owner of the land. The injunction will be granted until the trial of the action or until further order.

Solicitors: *S. Tilley; H. H. Wells.*

W. L. C.

STIRLING, J.

1889

April 17; May 15.

KINNAIRD *v.* TROLLOPE.

[1886 K. 1073.]

Mortgagor and Mortgagee—Tender of Principal, Interest, and Costs—Right to redeem disputed—Computation of Interest—Costs.

The Defendants mortgaged leasehold property to the Plaintiffs, and afterwards sold and assigned the equity of redemption therein to *A. B.*, who further charged the property in favour of the Plaintiffs. *A. B.* having become insolvent, the Plaintiffs brought an action against the Defendants upon the covenants in the original mortgage for the principal money and interest thereby secured.

The Defendants then took out a summons asking that, upon payment within one month of the principal money claimed in the action, with interest down to the date of payment, and costs, all further proceedings in the action might be stayed, and that the Plaintiffs upon such payment might reconvey the mortgaged property to the Defendants. The Plaintiffs refused to reconvey except upon payment of the moneys payable under the further charge as well as those payable under the mortgage.

A special case was then stated in the action, upon which the question was decided against the Plaintiffs, the costs being reserved.

Accounts were then taken in the action as between the Plaintiffs and Defendants, including an account of what was due under the mortgage, and in taking such accounts the Chief Clerk computed and certified interest on the principal moneys secured by the mortgage down to the date of payment.

Upon a summons taken out by the Defendants to vary the Chief Clerk's certificate by disallowing all interest subsequent to the date of the summons to stay proceedings:—

Held, that the summons for the stay of proceedings was not equivalent to a tender by the Defendants, and that interest must be paid by them down to the date of the payment of the principal.

Upon the further consideration of the action:

Held, that the Plaintiffs were not entitled to such part of the costs of the action as were occasioned by their having unsuccessfully disputed the Defendants' right to redeem.

ADJOURNED SUMMONS and further consideration.

By indenture dated the 4th of January, 1870, the Defendants mortgaged to the Plaintiffs a leasehold messuage to secure £12,000 and interest, and the mortgage deed contained the usual covenants for payment of principal and interest, and a proviso for redemption in the usual form.

In 1872 the Defendants sold the equity of redemption in the mortgaged premises for £9100 to the Earl of *Glasgow*; and by

indenture dated the 24th of June, 1872, they assigned the same to him, subject to the mortgage of the 4th of January, 1870, he covenanting to pay the £12,000 and interest, and to indemnify them therefrom.

By indenture dated the 10th of May, 1878, Lord *Glasgow* charged the mortgaged premises with the payment to the Plaintiffs of a further sum of £8000 and interest, and covenanted that the mortgaged premises should not be redeemable except on payment as well of the £8000 and interest as of the £12,000 and interest.

In 1886 Lord *Glasgow* became insolvent, and the interest on the mortgage-money fell into arrear.

On the 18th of September, 1886, the solicitors of the Plaintiffs wrote to the Defendants, calling upon them, under their covenants in the mortgage deed of the 4th of January, 1870, to pay the principal sum of £12,000 and interest, and informing them of the advance of £8000 and the further charge.

On the 24th of September, 1886, the solicitors of the Defendants wrote to the solicitors of the Plaintiffs asking them whether their letter of the 18th was to be taken as a notice to pay off the £12,000 borrowed in 1870.

The solicitors of the Plaintiffs in reply wrote to the solicitors of the Defendants on the 28th of September, 1886, as follows:—"In reply to your letter of the 24th inst., our application to your clients, Messrs. *Trollope*, is for payment of the £12,000 and interest under their covenant, and our contention is that they have no right to redeem, but must look to Lord *Glasgow* to recoup them under his covenant with them."

On the 5th of October, 1886, the solicitors of the Defendants wrote to the solicitors of the Plaintiffs as follows:—"We are in receipt of your letter of the 28th ulto. Our clients are prepared at a very short notice to redeem the mortgage for £12,000, but of course they will not pay this money without the securities being returned to them. If your clients intend to endeavour to compel them to pay the £12,000, and at the same time to retain or deal with the property for their own benefit, we should, of course, resist any such attempt, and make use of this letter on the question of costs."

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On the 4th of November, 1886, the Plaintiffs commenced this action in the Queen's Bench Division to recover the principal and interest due under the covenant contained in the mortgage deed of the 4th of January, 1870.

On the 12th of November, 1886, the Defendants took out a summons against the Plaintiffs, asking "that, upon payment within one month of the sum of £12,485 9*s.* 1*d.*, the amount claimed in this action, with interest at 5 per cent. per annum upon £12,000, to be computed from the 4th day of November, 1886 to the date of such payment, together with costs, this action, and all further proceedings be stayed, and that the Plaintiffs, upon such payments being made, do within three days thereafter transfer to the Defendants the mortgage debt of £12,000 secured by an indenture dated the 4th day of January, 1870; and all securities for the same, and all deeds which came into the possession of the Plaintiffs on the occasion of such security being given."

This summons came on before Master *George Pollock* on the 18th of November, 1886, but no order was made by the Master, as the Plaintiffs refused to transfer the mortgage except upon payment of the amount secured by the further charge, as well as the principal money, interest, and costs owing upon the original mortgage. The Defendants then appealed to the Judge in Chambers, when the Plaintiffs again refused to accept the payment offered and to transfer the mortgage, and the Judge referred this matter to the Divisional Court; that Court directed a special case to be stated for the opinion of the Court. The case was stated, and in it the contention of the Plaintiffs was thus stated:—"The Plaintiffs contend that the Defendants are not entitled even on payment of the sum of £12,000 and interest and costs to a transfer of the said mortgage of the 4th of January, 1870, or to an assurance or redemption of the property comprised therein, or to any stay of proceedings in this action, and that the Plaintiffs are entitled to tack the said sums of £12,000 and £8000 and the interest on the said sums respectively." Upon the case coming on to be argued before *Field* and *Wills*, JJ., they by consent ordered the action to be transferred to the Chancery Division.

The special case was then argued before Mr. Justice *Stirling*,

and his Lordship held (1) that the Plaintiffs were entitled to judgment, but only on the terms that, upon payment of what was due on the mortgage of the 4th of January, 1870, they should reconvey the mortgaged property to the Defendants, subject to such equity of redemption as might be subsisting in any person or persons other than the Defendants themselves.

On the 26th of November, 1888, the Defendants moved for judgment, and the Court ordered that (amongst other accounts) an account should be taken of what was due to the Plaintiffs under their mortgage of the 4th of January, 1870, otherwise than for their costs of the action, and reserved further consideration and the question of costs. These accounts were then taken. The Chief Clerk made his certificate on the 21st of March, 1889, and certified that in taking the accounts directed he had computed the interest on the principal sum of £12,000 down to the 11th of February, 1889, on which day the Defendants had made payment.

The Defendants then took out the present summons, asking that the Chief Clerk's certificate might be varied "by disallowing the Plaintiffs all interest on the principal sum of £12,000 subsequent to the 18th of November, 1886;" and this summons now came on for hearing, together with the further consideration of the action.

Buckley, Q.C., and *Horsbrugh*, for the Defendants, in support of the summons:—

The Defendants, by their summons taken out on the 12th of November, 1886, offered to pay the amount claimed in the action with interest and costs, and on the 18th of November, when the summons came on for hearing, the Plaintiffs refused to accept this offer. What took place then was tantamount to a tender by the Defendants on the 18th of November, 1886, and interest ought to cease to run as from that day.

Hastings, Q.C., and *Frank Evans*, for the Plaintiffs:—

Interest continued to run after the 18th of November, 1886, for there was no actual tender of the money, nor was any sum set

(1) 39 Ch. D. 636.

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apart or paid into Court: *Gyles* v. *Hall* (1); *Bishop* v. *Church* (2); *Garforth* v. *Bradley* (3); *Fisher* on Mortgages (4); at all events, there was a *bonâ fide* dispute between the parties which would prevent interest from running, even if there had been a tender: *Sharpnell* v. *Blake* (5); *Lutton* v. *Rodd* (6).

Buckley, in reply, referred to *Thomas* v. *Evans* (7).

[STIRLING, J., referred to *Hodges* v. *Croydon Canal Company* (8).]

The action was then heard on further consideration, and the question of costs was argued.

Hastings, Q.C., and *Frank Evans*, for the Plaintiffs:—

The Plaintiffs are mortgagees, and are entitled to their costs in the absence of fraud, oppression, or unreasonable conduct; none of these elements are present here: *Cotterell* v. *Stratton* (9); *In re Watts* (10).

[STIRLING, J., referred to *Hall* v. *Heward* (11).]

Buckley, Q.C., and *Horsbrugh*, for the Defendants:—

The Plaintiffs' contention that they were entitled to judgment for £12,000 and interest, without reconveying the mortgaged property to the Defendants, has been unsuccessful. They have failed, and a mortgagee who unsuccessfully disputes his mortgagor's right to redeem is not entitled to his costs: *Baker* v. *Wind* (12); *Detillin* v. *Gale* (13); *Shuttleworth* v. *Lowther* (14); *Harvey* v. *Tebbutt* (15); *Taylor* v. *Baker* (16); *Wheaton* v. *Graham* (17); *Credland* v. *Potter* (18); *Graham* v. *Horn* (19).

(1) 2 P. Wms. 378.
(2) 2 Ves. Sen. 371.
(3) Ibid. 675, 678.
(4) 4th Ed. p. 908.
(5) 2 Eq. C. Ab. 603.
(6) 2 Ch. Cas. 206.
(7) 10 East, 101.
(8) 3 Beav. 86.
(9) Law Rep. 8 Ch. 295, 302.
(10) 22 Ch. D. 5.
(11) 32 Ch. D. 430.
(12) 1 Ves. Sen. 160.
(13) 7 Ves. 583.
(14) Cited 7 Ves. 586.
(15) 1 Jac. & W. 197.
(16) Daniel, 71.
(17) 24 Beav. 483.
(18) Law Rep. 10 Ch. 8.
(19) W. N. (1866) 166.

Hastings, in reply, referred to *Ledbrook* v. *Passman* (1) and *Bird* v. *Wenn* (2).

1889. May 15. STIRLING, J. (after stating the facts, continued):—

The ground on which the summons is based is that the Defendants, although they made no actual tender prior to action, and have made no payment into Court in the action, are nevertheless entitled to be placed in the same position as if they had tendered the Plaintiffs their principal, interest and costs on the 18th of November, 1886. This question was argued upon the decisions in equity to which I shall presently refer; but it is not to be forgotten that this is a common law action brought on the covenants for payment of principal and interest contained in the mortgage deed of the 4th of January, 1870, and it seems not immaterial to consider what would be requisite to the success of a plea of tender in such an action. This is stated very shortly and clearly by Lord Chief Justice *Wilde*, delivering the considered judgment of the Court of Common Pleas in the case of *Dixon* v. *Clark* (3) He says: "In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is, that the Defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance, by refusing to receive it. And, as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in Curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in Curiam*), yet he will answer the action, in the sense that he will recover judgment for his costs of defence against the plaintiff—in which respect the plea of tender is essentially different from that of payment of money into Court." Then he says: "With respect to the averment of *toujours prist*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can

(1) 57 L. J. (Ch.) 855. (2) 33 Ch. D. 215.
(3) 5 C. B. 365, 377.

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shew that an entire performance of the contract was demanded and refused, at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea." It, therefore, appears, that, if the plea of tender is to be successful at law, two matters are requisite—first, that the defendant must not only make the tender, but must always be ready to perform entirely the contract on which the action is founded; and secondly, that the plea must be accompanied by a payment into Court.

By Order XXII., rule 3, it is provided that, with a defence setting up a tender before action, the sum of money alleged to be tendered must be brought into Court. Rule 1 of the same Order provides for payment into Court by way of satisfaction.

It, therefore, appears at law that a plea of tender, to be successful, must be accompanied by a payment into Court. No such payment has been made; and even if it be assumed in the Defendants' favour that a formal offer of the money before action brought was waived by the Plaintiffs, still the summons of the 12th of November, 1886 (which seeks a month for payment) cannot, I conceive, be treated as equivalent to a plea of tender; and, even if it could, the defence would fail by reason of its not being followed, still less accompanied, by a payment into Court. Nothing, therefore, happened in the action down to the 26th of November, 1888, to prevent the Plaintiffs from recovering judgment for principal and interest down to that date; and it would not, I conceive, be in accordance with principle that a Court of Equity should compel the mortgagee to part with an estate which had become absolute at law without seeing that the mortgagor fulfilled completely his legal obligations under the mortgage deed.

I prefer, however, to dispose of the summons with reference to the cases in equity which were cited in argument. The first is that of *Gyles* v. *Hall* (1). There the bill sought to compel a reassignment of a mortgage, and to stop the interest from the 25th of September, 1722, there having been a tender of £1000, the amount of the mortgage money and interest to that date. There was a question raised as to whether the tender was made at the proper place, and the Lord Chancellor held that it was, and then

(1) 2 P. Wms. 378.

he goes on: "But in this case it ought to appear, that the mortgagor from that time always kept the money ready; whereas the contrary thereof being proved, that the mortgagor was not ready to pay it, therefore the interest must run on." The rule in equity therefore accords in this respect with the rule at law as laid down by Lord Chief Justice *Wilde* (1): "With respect to the averment of *toujours prist*, if the plaintiff can falsify it, he avoids the plea altogether."

In *Bishop* v. *Church* (2) Lord *Hardwicke* says: "There are several instances of mortgages, where there are many attempts by a mortgagor to pay them off, and reasonable offers of payment; yet if a strict tender is not made, the Court cannot stop the interest: though cases may be, where the Court would wish to do it."

In *Garforth* v. *Bradley* (3), his Lordship says: "The rule is so strict, that, where a certain security is taken by mortgagees, their interest shall not stop but upon a proper tender and notice"—(by notice I understand him to refer to the rule of equity which requires six months' notice to be given of the intention to pay off the mortgage debt)—"which rule, if not observed, the Court will not stop the interest; for he has a legal security for his money; may bring an ejectment and bill for foreclosure"—(I may add, an action on the covenants in the mortgage deed)—"at the same time, which the Court will not prevent; it would be going a great way, therefore in this case to say, that the interest should stop."

In *Hodges* v. *Croydon Canal Company* (4), there was a dispute between mortgagor and mortgagee whether the latter was entitled to twenty years' interest or only six. The defendants, the mortgagors, stated that they were ready and willing to pay the principal debt and six years' interest, but made no tender. Lord *Langdale* decided that they were entitled to redeem on those terms, but said (5), "As to the costs, there was no tender or offer to pay until the bill was filed; the defendants must therefore pay the costs. If there had been a tender of the principal and six years' interest, then the plaintiff would have had to pay them.

(1) 5 C. B. 378.
(2) 2 Ves. Sen. 371, 372.
(3) 2 Ves. Sen. 675, 678.
(4) 3 Beav. 86.
(5) 3 Beav. 90.

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At law great weight is given, and, if I may say so, justly given, to an actual tender of the money, but in some cases doubtless a tender may be dispensed with: see *Allen* v. *Smith* (1). In equity no case has been cited in which interest has been stopped where there has not been an actual tender of the money due, and it is contended that the rule of equity is strict that there must be such actual tender. I am not satisfied that that is not placing the rule too high.

It is not, however, in my opinion, necessary to decide whether in equity anything short of an actual tender will stop interest. Neither need I express any opinion on a question which may have hereafter to be considered, namely, whether Order XXII., r. 3, does not impose on a defendant in a foreclosure action who relies on a tender the obligation of making a payment into Court; but where no actual offer of money is made, and advantage is not taken of the opportunity afforded by Order XXII., rr. 1 and 3, to make payment into Court, I think the Court ought to be satisfied of the existence of that continued readiness to pay, which both at law and in equity are essential to the success of a plea of tender. In this case the only materials I have for forming an opinion on this point are, first of all the proceedings in the action, and secondly, the statements in the special case and the correspondence there set out; and, looking at the letter of the 5th of October, 1886, and to the course taken by the Defendants in the action, I think the just inference is that though the Defendants were willing to redeem on payment of £12,000 interest and costs, they were not either ready or willing to part with their money until it was ascertained that they could redeem on those terms, and that the summons of the 12th of November, 1886, was really taken out as a cheap and speedy mode of ascertaining their rights.

In my opinion the summons to vary fails, and must be refused with costs.

On the further consideration I have to deal with the general costs of the action.

If the action be treated as an ordinary common law action, I apprehend that I should have a discretion as to such costs of the

(1) 12 C. B. (N.S.) 638, 645.

action as were occasioned by any claims of the Plaintiffs which prove to be unfounded, but here again equitable rules were relied on.

The rule as to costs of a mortgagee in suits in equity is thus laid down by Lord *Selborne*, L.C., in *Cotterell* v. *Stratton* (1). "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court which, in litigious causes is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner, the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust. These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract."

It is well settled that the mere fact of a mortgagee claiming more than he is entitled to is not sufficient to deprive him of his costs: see *Hodges* v. *Croydon Canal Company* (2), already cited, and *In re Watts* (3). On the other hand a mortgagee who denies the mortgagor's right to redeem may be deprived of costs, or may even be ordered to pay them: see *Hall* v. *Heward* (4).

No case has been cited which precisely governs the present, but assistance is to be derived from the case of *Credland* v. *Potter* (5). In that case the mortgagors mortgaged a piece of land to the defendants *Potter* and *Brown* to secure £1100, and this security was duly registered in the *West Riding* registry office. On the 30th of October, 1871, the mortgagors executed

(1) Law Rep. 8 Ch. 295, 302.
(2) 3 Beav. 86.
(3) 22 Ch. D. 5.
(4) 32 Ch. D. 430.
(5) Law Rep. 10 Ch. 8.

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a further charge in favour of *Potter* and *Brown* which was not registered. On the 31st of January, 1872, they mortgaged the same property to the plaintiff to secure £363 and further advances subject to the original mortgage, saying that that was the only charge on the property. The plaintiff had no actual notice of the further charge. The plaintiff's mortgage was duly registered, and notice of it was given to *Potter* and *Brown*. The plaintiff having filed a bill to redeem on payment of what was due on the first mortgage only, the defendants *Potter* and *Brown* claimed priority on the ground that the further charge did not require registration, and that the plaintiff had notice of the charge. The Vice-Chancellor held the plaintiff entitled to redeem on the terms offered by the bill, and refused to give *Potter* and *Brown* any costs. They appealed, and the appeal was dismissed. The Lord Chancellor (Lord *Cairns*) there says (1): "As regard the costs, I should be slow to infringe on the rule that a mortgagee is entitled to the costs of a redemption suit; but the present is like a case where a mortgagee denies the mortgagor's right to redeem. *Potter* and *Brown* refused to allow redemption, except on payment of what was due on both their securities, and I think that they have had from the Vice-Chancellor as much indulgence as they were entitled to in the matter of costs." It is true that in that case the mortgagees raised a question of fact, which was decided against them, as well as a question of law; but I think that Lord *Cairns'* judgment shews that a right to tack may be so claimed by a mortgagee as to bring him within the rule applicable to cases where the right to redeem is denied, and I must inquire within which of the two lines of authorities to which I have referred the present case more nearly falls.

Now I find that the Plaintiffs by the letter of the 28th of September, 1886, state their contention to be that the Defendants have no right to redeem, and by the special case they contend that the Defendants are not entitled even on payment of the sum of £12,000 and interest and costs to a transfer of the mortgage of the 4th of January, 1870, or to an assurance or redemption of the property comprised therein, and, further, that they are

(1) Law Rep. 10 Ch. 13.

entitled as against the Defendants to tack the sums of £12,000 and £8000 and the interest thereon respectively.

It may be inferred, I think, from what has happened in the course of the proceedings that the mortgaged property was a very inadequate security for the sum of £20,000, and in my opinion the claim set up by the Plaintiffs was practically equivalent to a denial of the Defendants' right to redeem.

On the other hand, the case set up by the Plaintiffs cannot be said to have been purely frivolous and vexatious, and the Plaintiffs concurred in obtaining, or, at all events, threw no obstacles in the way of the Defendants obtaining as speedy a decision as possible on their rights.

In my opinion, therefore, justice will be done if I disallow the Plaintiffs such of the costs as are fairly attributable to their having put forward a case which has failed, viz., the costs of and consequent on the summons of the 12th of November, 1886, from the time when it was referred to the Divisional Court down to the time when the special case was disposed of by me—the Plaintiffs to have the other costs of the action.

Solicitors for Plaintiffs: *Burrows, Barnes & Pears.*
Solicitors for Defendants: *Trollope & Winckworth.*

W. W. K.

In re BURNABY'S SETTLED ESTATES.

STIRLING, J.
1889
May 30.

Settled Estate—Title Deeds—Custody—Equitable Tenant for Life.

An equitable tenant for life of a settled estate declared entitled to the custody of the title deeds upon undertaking not to part with them without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions.

ADJOURNED SUMMONS.

The Rev. *Frederic George Burnaby*, by his will, dated the 7th of August, 1875, devised his freehold estates in the parish of *Evington* to Vice-Chancellor Sir *R. Malins*, the Rev. *J. Cartmell*, his (the testator's) brother *Charles Sherard Burnaby*, and the Rev. *W. B. Moore*, their heirs and assigns, upon trust to pay

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certain annuities, and subject thereto in trust for the said *Charles Sherard Burnaby* for life without impeachment of waste, and after his death upon certain trusts and with divers remainders over. The will contained no power of sale as to the *Evington* estate.

The testator died on the 31st of January, 1880, and Vice-Chancellor *Malins* disclaimed and renounced the trusts of his will in May, 1880.

The *Evington* estate, which was situated near the town of *Leicester*, and comprised building land for which there was a considerable demand, was held by the testator, as to part under one title, and to the remainder under another title. After the testator's death Mr. *C. S. Burnaby* was let into possession of the estate as equitable tenant for life; the two sets of title deeds relating to the estate were delivered to him, and he kept down the annuities given by the will. In the year 1881 the Court, under the provisions of the *Settled Estates Act*, 1877, sanctioned the raising of the sum of £7000 on mortgage, for the purpose of laying out part of the estate for building purposes; and by an indenture dated the 31st of August, 1881, a portion of the estate was mortgaged to secure this sum. On the occasion of this mortgage one of the two sets of title deeds, *i.e.*, that relating to the portion of the estate included in the mortgage, was handed over to the mortgagees, and Mr. *C. S. Burnaby* retained possession of the other set of title deeds. By an order dated the 26th of February, 1883, the Rev. *J. Cartmell* and the Rev. *W. B. Moore* were appointed trustees of the will for the purposes of the *Settled Land Act*, 1882. The portion of the estate comprised in the mortgage was duly laid out for building purposes, and several plots of land were sold by Mr. *C. S. Burnaby* to various purchasers under the provisions of the *Settled Land Act*, 1882. On some of these sales the purchase-money was paid to Messrs. *Cartmell & Moore* as the trustees for the purposes of the *Settled Land Act*, and on others it was paid into Court, and on the latter occasions those gentlemen were not made parties to the conveyances. In all cases the acknowledgment of the right of the purchaser to production of the title deeds was given by Mr. *C. S. Burnaby* alone.

In the year 1885 the mortgage of the 31st of August, 1881, was paid off out of moneys arising from these sales, and upon this occasion the title deeds in the hands of the mortgagees were not delivered back to Mr. *C. S. Burnaby*, but, under protest from him, were deposited in the joint names of himself and Messrs. *Cartmell* and *Moore* as the trustees of the will.

This was an application by summons under the *Settled Land Act*, 1882, on behalf of Mr. *C. S. Burnaby*, as the tenant for life of the *Evington* estate, for the sanction of the Court to a conditional contract for the purchase of certain property, and also for the direction of the Court as to the custody of the title deeds relating to the settled estate.

The contract was confirmed in Chambers, and this summons was adjourned into Court upon the latter point only.

Beale, Q.C., and *Borthwick*, for Mr. *C. S. Burnaby*, in support of the summons:—

Since the *Settled Land Act*, 1882, the tenant for life of a settled estate is the person to make sales and leases of the estate, and the only person with whom intending purchasers and lessees have to deal. It is his duty to prepare and verify the abstract of title; and it is proper and highly convenient that the deeds should be in his custody, particularly in a case where the settled estate comprises building land and sales and leases are of frequent occurrence, otherwise much unnecessary expense might be occasioned, and he might be hampered in the exercise of his duties and rights. In this case the equitable tenant for life has kept down the annuities, and the trustees have no active duties to perform.

[They referred to *Lady Langdale* v. *Briggs* (1), and *Taylor* v. *Sparrow* (2)].

Hastings, Q.C., and *Nalder*, for the trustees:—

The trustees, who are trustees for the remaindermen as well as for the equitable tenant for life, would seem to be the proper persons to have the custody of the title deeds, but they only desire to be properly protected, and are ready to submit to the

(1) 8 D. M. & G. 391, 416. (2) 4 Giff. 703.

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order of the Court. It is suggested that the deeds might be brought into Court as in *Denton* v. *Denton* (1).

STIRLING, J.:—

I will make an order giving Mr. *C. S. Burnaby* the custody of the title deeds upon his undertaking not to part with them without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions.

Solicitors: *Rye, Eyre, & Willoughby*, agents for *J. Hodding, Leicester; Collyer-Bristow, Withers, Russell & Hill*, agents for *Ingram & Moore, Leicester.*

W. W. K.

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In re PAUNCEFORT. THE CORPORATION OF THE SONS OF THE CLERGY *v.* CHRIST CHURCH, OXFORD.

[1888 P. 1210.]

University—College—Benefaction—Founders' Design—Condition of Eligibility —"Designed for Holy Orders"—Universities of Oxford and Cambridge Act, 1877 (40 & 41 *Vict. c.* 48), *ss.* 2, 12, 14, 17, 51 [*Revised Ed. Statutes, vol. xviii. p.* 404]—*Statutes for College—Alteration of Conditions of Eligibility—Christ Church, Oxford, Act,* 1867 (30 & 31 *Vict. c.* 76)—*Universities Tests Act,* 1871 (34 *Vict. c.* 26), *ss.* 2, 3 [*Revised Ed. Statutes, vol. xvi. p.* 614.]

Edward Pauncefort, who died in 1726, by will made in 1723 gave property to a corporation upon trust to divide the income thereof equally between ten of the servitors of *Christ Church College, Oxford,* such as certain members of the College should recommend "for their sobriety, diligence at their studies, and of parts fit for a Minister of the Gospel and designed for Holy Orders."

By the *Universities of Oxford and Cambridge Act,* 1877, Commissioners were empowered to make statutes for any College altering the conditions of eligibility for any emolument or office connected with the College, but in so doing they were to have regard to the main design of the founder, except where the conditions had been altered in substance under any other Act; by the same Act, a mode of and time for appeal against such statutes before approval by Order in Council was provided, and it was

(1) 7 Beav. 388, 394.

enacted that after such approval such statutes should be binding on every College, and should be effectual notwithstanding any instrument of foundation.

By statutes made for *Christ Church* under this Act, and duly approved, the Commissioners in effect provided that the exhibition of the foundation of Mr. *Pauncefort* should be applied to the support of certain college exhibitioners without the attachment of any condition as to such exhibitioners being designed for Holy Orders.

Upon a summons taken out by the corporation under Order LV., rule 3:—

Held, that the statutes having been duly approved were binding upon the corporation notwithstanding the instrument of foundation, and that the condition that the recipients of the benefaction should be designed for Holy Orders could no longer be enforced.

THIS was a summons taken out under Order LV., rule 3, by the governors of the charity for the relief of the poor widows and children of clergymen, commonly known as the *Corporation of the Sons of the Clergy*, against the Dean and Chapter of *Christ Church, Oxford*, the Attorney-General and certain Exhibitioners of *Christ Church*, in order to determine who were entitled to a benefaction originally given to the corporation, as trustees, by the will of *Edward Pauncefort*.

The corporation was incorporated by Royal Charter in 1678, for the purpose of receiving and distributing funds for the benefit of the widows and children of clergy of the Church of *England*, and they hold various properties and funds some of which are applicable on special trusts, amongst which are those now in question.

Edward Pauncefort, who died in 1726, by his will dated the 26th of May, 1723, directed his executors, out of his personal estate and moneys, to purchase land and hereditaments of a good fee-simple estate of inheritance of the clear yearly value of £100, and when purchased to convey the same to the *Corporation of the Sons of the Clergy* and their successors, upon trust, by and out of the annual rents and profits of the said lands, to pay to eight Ministers' widows of honest repute and known industry £5 per annum each yearly in manner therein mentioned; "and, upon further trust, that the residue of the rents and profits of the lands that shall be so purchased and settled shall be equally divided between ten of the Servitors of *Christ Church College* in *Oxford*, such as the Dean, two of the Canons, and six of the Senior Students of the said College shall recommend under their hands, for their

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sobriety, diligence at their studies, and of parts fit for a Minister of the Gospel and designed for Holy Orders, the same to be paid yearly, on the Feast day of the Sons of the Clergy, to such person as shall be deputed by the Dean of the said College under his hand and seal to receive and pay the same to the ten poor Servitors." Then, after stating that the gift was in satisfaction of a legacy of £2000 given by his wife, the testator proceeded: "And it is my will and mind that until such purchase and settlement shall be made, my said executors shall, out of my said personal estate and the interest and produce aforesaid, pay the yearly sum of £100 to the said *Corporation of the Sons of the Clergy*, to be by them paid and distributed to and amongst the said eight Ministers' widows and the said ten poor Servitors in manner and in such proportions as aforesaid."

Shortly after the death of the testator, in pursuance of his will, and under the authority of the Court of Chancery, lands were duly purchased, the rents of which were applied in accordance with this trust until 1856, when such lands were sold, and the proceeds invested in Consols in the name of the Corporation, who duly applied the dividends in the same manner.

From the time that the trust came into operation, down to the year 1887, it had been the practice of the corporation, after paying the pensions of £5 per annum to the eight Ministers' widows to pay over the residue of the income of the fund, which residue since the year 1856 had amounted to £163 per annum, upon a certificate signed by the Dean, two of the Canons, and six of the Senior Students of *Christ Church*, certifying that the persons named in the certificate were Servitors of *Christ Church*, and possessed the qualifications which were mentioned in the will of the testator; but in that year the question was raised whether this course ought any longer to be pursued, and whether in point of fact the religious qualifications which were attached by the testator to this benefaction ought to be regarded as any longer in force or required, in order to entitle the Servitors, or the Exhibitioners who had taken their place, to the benefit of the charitable trust declared by the will.

The statutes and ordinances relating to college emoluments and foundations material to this question, were as follows:—

By the *Oxford University Act*, 1854 (17 & 18 Vict. c. 81), certain Commissioners were appointed who were empowered to frame ordinances in case of the non-exercise by any college of the powers of making statutes conferred by the Act; and an ordinance for *Christ Church* framed by these Commissioners provided in its 26th section as follows: "It shall be lawful for the Dean and Chapter to alter in such manner as they think fit the designation of the Servitors, and to apply the Exhibitions of the foundation of Archbishop *Boulter* for Servitors, Mr. *Pauncefort*, Dr. *Gardiner*, Bishop *Frampton*, Dr. *Cotton*, and Mrs. *Paul*, to the support of the persons bearing altered designations."

By the *Christ Church Oxford Act*, 1867 (30 & 31 Vict. c. 76), two ordinances which had been made for *Christ Church* by the Commissioners dated respectively the 9th of January, and the 16th of April, 1858, were repealed, and the ordinance set forth in the Schedule to the Act was substituted for them. By a portion of the 1st section of this new ordinance it was provided as follows:—

"The Servitorships existing within the house shall be maintained, either under that designation or under such new designation as the governing body hereinafter mentioned may determine; and the Exhibitions of the foundation of Archbishop *Boulter* for Servitors, Mr. *Pauncefort*, Dr. *Gardiner*, Bishop *Frampton*, Dr. *Cotton*, and Mrs. *Paul*, may, in the latter case, be applied to the support of the persons bearing such altered designation."

The *Universities Tests Act*, 1871, after providing in sect. 2, that the word "College" should include the Cathedral or House of *Christ Church, Oxford*, and that the word "office" should include every Exhibition and also any office or emolument, not in that section specified, the income of which was payable out of the revenues of any of the universities comprised in the Act or of any college therein or was held by any member as such of any of the said universities or any college therein, enacted in sect. 3, that after the passing of the Act no person should be required in order to enable him to take or hold any office in any of the said universities or colleges, to subscribe any article of faith, or make any declaration or take any oath respecting his religious belief . . . or to attend or abstain from attending any

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form of public worship, or to belong to any specified church, sect, or denomination . . . "Provided that (1) nothing in this section shall render a layman or a person not a member of the Church of *England* eligible to any office or capable of exercising any right or privilege in any of the said universities or colleges, which office, right, or privilege, under the authority of any Act of Parliament or any statute or ordinance of such university or college in force at the time of the passing of this Act, is restricted to persons in Holy Orders, or shall remove any obligation to enter into Holy Orders which is by such authority attached to any such office."

By the *Universities of Oxford and Cambridge Act*, 1877 (40 & 41 Vict. c. 48), certain Commissioners were appointed for those Universities with powers to make statutes for them, or for any College (including *Christ Church*) or Hall in them.

The material provisions of this Act are as follows:—

By sect. 2, "emolument" is defined as including, amongst other things, "exhibition . . . servitorship, sizarship, subsizarship, or other place in the University or a College or Hall, having attached thereto an income payable out of the revenues of the University or of a College or Hall, or being a place to be held and enjoyed by a head or other member of a College or Hall as such, or having attached thereto an income to be so held and enjoyed, arising wholly or in part from an endowment, benefaction, or trust."

By sect. 12, the Commissioners are empowered to make statutes for either University, and for any College or Hall therein respectively, and for altering and repealing statutes made by the Commissioners, and to exercise such powers from time to time.

By sect. 14: "The Commissioners, in making a statute affecting a university or college emolument, shall have regard to the main design of the founder, except where the same has ceased to be observed before the passing of this Act, or where the trusts, conditions, or directions affecting the emolument have been altered in substance by or under any other Act."

By sect. 17: "The Commissioners in statutes made by them for a College, may from time to time make provision for the following purposes relative to the College, or any of them:

(1) For altering and regulating the conditions of eligibility or appointment, including where it seems fit those relating to age, to any emolument or office held in or connected with the College, the mode of election or appointment thereto, and the value, length, and conditions of tenure thereof, and for providing a retiring pension for a holder thereof." . . . . "(8) For modifying the trusts, conditions, or directions affecting any College endowment, foundation, or gift, or any property belonging to the College, or the head or any member thereof, as such, or held in trust for the College, or for the head or any member thereof as such, as far as the Commissioners think the modification thereof necessary or expedient for giving effect to statutes made by them for the College."

By sect. 44, a Universities Committee of the Privy Council is constituted; and by sect. 45, the Commissioners within one month after making a statute are to submit it to Her Majesty in Council, and notice of such submission is to be published in the Gazette. By sect. 46 (amongst other persons) the trustees of a University or College emolument may at any time within three months after the gazetting of a statute whereby the emolument was directly affected, petition the Queen in Council for disallowance thereof, and any statute petitioned against might be referred to the Universities Committee.

By sects. 49 and 50, statutes not referred to the Universities Committee or not disallowed or remitted are to be laid before both Houses of Parliament, and if neither House within twelve weeks prays the Queen to withhold her consent, such statutes may be approved by Order in Council.

By sect. 51: "Every statute or part of a statute made by the Commissioners and approved by Order in Council shall be binding on the University and on every College and Hall, and shall be effectual notwithstanding any instrument of foundation or any Act of Parliament, Order in Council, decree, order, statute, or other instrument or thing constituting wholly or in part an instrument of foundation, or confirming or varying a foundation or endowment, or otherwise regulating the University, or a College or Hall."

By sect. 57 nothing in the Act is to be construed to repeal

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any provision of the *Universities Tests Act*, 1871; and by sect. 58, the Commissioners may, in the erection or endowment of a new theological office other than a headship or fellowship of a College, require in the incumbent thereof the possession of theological learning, notwithstanding the *Universities Tests Act*, 1871.

Under this Act of 1877, the *Oxford* Commissioners made statutes for *Christ Church, Oxford*, the 23rd clause whereof was as follows:—

"The exhibitions of the foundations of Archbishop *Boulter* for servitors, Mr. *Pauncefort*, Dr. *Gardiner*, Bishop *Frampton*, Dr. *Cotton*, and Mrs. *Paul*, shall be applied to the support of College Exhibitioners, who shall be elected after examination in such subjects and such manner as the Governing Body shall determine. Notice of each election shall be given in the same manner as that prescribed above for the election of Open Scholars, and the Exhibitioners shall be elected at first for two years only, the tenure of these Exhibitions being renewable in the same manner as that allowed for Scholarships, and on the same terms. No person shall be appointed to one of these Exhibitions unless he shall give sufficient proof to the Dean of his need of such assistance to enable him to obtain the benefit of a University education." Clause 22 contained the regulations as to Scholarships and as to Open Scholarships it was thereby provided as follows:—"There shall be an election to five Open Scholarships in every year, they shall be tenable for two years from the day of election, if the person elected be already a member of the University; if otherwise, from the Midsummer Day next following, and (at the expiration of such two years) shall then determine, unless the Governing Body have by resolution declared themselves satisfied with the industry and good conduct of the scholar, in which case the scholar's tenure shall be renewed for a further term of two years."

These statutes were duly submitted to Her Majesty in Council, and gazetted. No petition for their disallowance in whole or in part was presented, and they were duly approved by Order in Council, dated May 3, 1882.

In the year 1887 the attention of the Governing Body of *Christ Church* was called to the form of the certificate in use for

recommending the recipients for the *Pauncefort* benefaction, and having come to the conclusion that the statutes for *Christ Church* had rendered that and other Exhibitions prizes of a competitive examination open to all persons without distinction of religious belief but subject to a poverty qualification, they suggested to the corporation that the form of such certificate should be altered accordingly.

The present summons was the result of this suggestion, and the questions submitted for determination by the Court were as follows:—

1. Who are entitled to the residue of the income of the trust estate by the said will directed to be divided between ten of the servitors of *Christ Church College, Oxford,* such as the Dean, two of the Canons, and six of the senior students of the said College should recommend under their hands for sobriety, diligence at their studies, and of parts fit for a minister of the Gospel, and designed for Holy Orders?

2. Ought the Plaintiffs to pay the said residue of income to the Defendant corporation for division amongst persons selected by the Dean, two of the Canons and six of the students of the said College without the said persons having been recommended as of parts fit for a minister of the Gospel, and designed for Holy Orders?

3. What conditions (if any) are now attached to the said gift of the residue of the said income, and what certificate or recommendation are the Plaintiffs entitled to demand before payment of the residue of the said income to the Defendant corporation?

Rigby, Q.C., and *Dibdin,* for the *Corporation of the Sons of the Clergy,* in support of the summons:—

The *Oxford* Commissioners had no right or power to disregard the express directions of *Edward Pauncefort* that the persons to be recommended to share in his bounty should be "of parts fit for a minister of the Gospel, and designed for Holy Orders." The words of his bequest and his selection of a clerical body to administer the trust constituted by his will, shew clearly that his main design was to benefit the profession of Holy Orders. By the 14th section of the *Universities of Oxford and Cambridge Act,*

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1877, the Commissioners "in making a statute affecting a university or college emolument shall have regard to the main design of the founder," except in cases which do not occur here. So that if this is an emolument within that Act the Commissioners had no jurisdiction to make the enactment contained in clause 23 of the statutes for *Christ Church, Oxford.* But we submit that the persons selected to share in the residuary income of this trust estate are not the holders of "any office in any of the said universities or colleges" within the meaning of the *Universities Tests Act,* 1871; and that what they are selected to receive is not an "emolument" within the Act of 1877.

Buckley, Q.C., and *Kingdon,* for the Dean and Chapter of *Christ Church* and the Exhibitioners:—

The persons selected to share in this benefaction are the holders of an "office"(which is defined to include every exhibition and also any emolument) within the meaning of the *Universities Tests Act,* 1871; and since that Act they cannot be required to belong to "any specified church," unless (which is not the case here) they fall within the proviso at the end of the section. But however this may be, the *Oxford* Commissioners, under the Act of 1877, had, by the 17th section thereof, full power, by statutes made by them, to alter the conditions of eligibility or tenure of, and to modify the trusts affecting any emolument or office held in or connected with any college. The Commissioners, who were men of eminence, have under this power and after deliberation, made statutes altering the conditions of eligibility for the benefaction. Those statutes have not been brought before the Universities Committee of the Privy Council by way of appeal, but have been duly approved of and are binding. And accordingly the Plaintiffs can no longer require that the persons selected to share in this benefaction shall be designed for Holy Orders.

[They referred to *Attorney-General* v. *Sidney Sussex College* (1), and *Reg.* v. *Hertford College* (2).]

Ingle Joyce, for the Attorney-General, supported the contention of the Dean and Chapter of *Christ Church* and the Exhibitioners.

Dibdin, in reply.

(1) Law Rep. 4 Ch. 722. (2) 3 Q. B. D. 693.

1889. June 4. STIRLING, J. (stated the will of *Edward Pauncefort*, and continued):—

Now, that benefaction is one which has in contemplation that the recipients of it should be intended for Holy Orders in the Church of *England*. It also appears, I think, plainly enough on the face of this will that poverty was to be an element in the qualification of the persons to whom this benefaction was to be made.

[His Lordship then stated the facts of the case, and the statutes and ordinances above set forth down to the *Universities Tests Act*, 1871. In the course of this statement he observed as to the 26th section of the ordinance under the *Oxford University Act*, 1854, that it did not in any way affect the conditions of tenure or eligibility to this benefaction, but simply provided that if the Dean and Chapter saw fit to alter the designation of the servitors, the Exhibitions on this foundation might be applied for the support of the persons bearing the altered designation; and as to the *Universities Tests Act*, 1871, his Lordship said that it did not appear to him necessary for the decision of the case that he should express any opinion as to the effect of that Act on the tenure of these Exhibitions, and that he therefore desired to abstain altogether from stating any opinion upon the construction of that statute. His Lordship then went through the Act of 1877 and continued:—]

Now, first of all, what is the meaning of clause 23 of the statutes for *Christ Church?* It seems to me that the Commissioners who framed the statute have thereby declared that these Exhibitions of the foundation of Mr. *Pauncefort* are to be applied to the support of College Exhibitioners, to be elected after examination in such manner as the Governing Body shall determine, the notice of election to be given in the same manner as that prescribed for the election of Open Scholars, and the tenure of the Exhibitions is to be for two years only, but renewable in the same manner as the scholarships and on the same terms; and they have attached to the tenure of these Exhibitions this condition, that the holder shall give sufficient proof of his need of such assistance to enable him to obtain the benefit of a University education.

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I confess I cannot bring my mind to doubt that the framers of the statutes intended that the conditions laid down in the 23rd clause of the statutes should be the conditions, and the only conditions, of eligibility for the tenure of these Exhibitions.

Then the next question is, had they power to make such an ordinance with reference to the Exhibitions? I think they had. The first part of sect. 17 of the Act of 1877 seems to me to be enough to determine the question. It provides that, "The Commissioners, in statutes made by them for a College, may from time to time make provision for the following purposes relative to the College or any of them: (1.) For altering and regulating the conditions of eligibility or appointment . . . to any emolument or office held in or connected with the College, the mode of election or appointment thereto, and the value, length, and conditions of tenure thereof." Is this an emolument held in or connected with the College? The definition of "emolument" includes an Exhibition, and by a series of statutes, one of which has received the express sanction of the Legislature, this benefaction is described as an Exhibition of the foundation of Mr. *Pauncefort.* It seems to me that this was an Exhibition, and therefore an emolument, and held in *Christ Church.* It was held nowhere else certainly. That would seem to me to be enough. But the Commissioners have also power to make provision "For modifying the trusts, conditions or directions affecting any College endowment, foundation or gift;" and again, it would seem to me that it would fall under those words, and that they have power under those words to do what they have done.

But then it is said that sect. 14 requires them to have regard to the main design of the founder, "Except where the same has ceased to be observed before the passing of this Act, or where the trusts, conditions, or directions affecting the emolument have been altered in substance by or under any other Act." It is not for me to criticise what the Commissioners have done. The Commissioners, as was pointed out during the argument, were men of the greatest possible eminence. They were dealing with the endowments of the Universities and Colleges of *Oxford* and *Cambridge* as a whole, and they had probably means of judging

which are not open to me. But, however that may be, no doubt the Legislature considered that difficult questions might arise as to which different opinions might fairly be entertained, and for that purpose provided that the decision of the Commissioners with reference to such matters should not be final, and that there should be an appeal to the Universities Committee of the Privy Council; and it is enough for me to say that, having looked as carefully as I can at the documents in this case, I think the *Corporation of the Sons of the Clergy* might very fairly have laid before the Commissioners, or before the Universities Committee of the Privy Council, the facts which they have laid before me on this summons, and might have urged that these Exhibitions ought to be devoted to what they have termed the professional education of Clergymen, and might have asked that regard should be paid to the intention of the founder as shewn in his will. However, that course was not taken, and the Statutes as a whole have been approved. I think, therefore, that sect. 51 of the Act of 1877 applies, and that this statute is binding on the College, and is effectual notwithstanding the instrument of foundation.

It seems to me, accordingly, that the 23rd clause of the statutes framed by the Commissioners for *Christ Church* now regulates the conditions of eligibility to these Exhibitions and their tenure, and that the corporation can no longer require from the Dean, Canons, and Students of *Christ Church* a certificate in the form in which they have hitherto been in the habit of giving one, but that they are bound to pay over the fund in question for division among the persons who are entitled thereto as Exhibitioners under the 23rd clause of the present statutes, and that a certificate to that effect is all that the corporation can at present require.

Solicitors: *Bridges, Sawtell, Heywood, & Co.; Baker, Folder, & Upperton; The Solicitor to the Treasury.*

W. W. K.

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WOOD v. ODESSA WATERWORKS COMPANY.

[1889 W. 1771.]

Public Company—Profits earned applied to extension of Works—Bonds bearing Interest given in payment of Dividend—Construction of Articles of Association—Ultrà vires.

A waterworks company constituted under the *Companies Act*, 1862, having applied the profits which had been earned to the construction of productive works instead of paying a dividend to the shareholders, passed a resolution proposing to give to the shareholders debenture bonds bearing interest, and redeemable at par, by an annual drawing, extending over thirty years. The articles of association empowered the directors, with the sanction of the company, to declare a dividend "to be paid" to the shareholders:—

Held, that what was proposed to be done by the passing of the resolution was, upon the true construction of the articles, not in accordance with them, and that there must be an injunction to restrain the directors from acting on the resolution.

MOTION that the Defendant company (limited), their directors and agents, might be restrained until the hearing of the action, or further order, from acting on a certain resolution passed at the general meeting of the company held on the 24th of April, 1889, for the payment of dividends on the A shares in the capital of the company by the distribution of bonds of the company, and from issuing any bonds of the company by way of dividends. The *Odessa Waterworks Company* was formed under the *Companies Act* of 1862 (25 & 26 Vict. c. 89) as a company limited by shares, with a capital of £850,000, divided into 42,500 shares of £20 each, of which 30,000 were A preferred shares, and 12,500 were B deferred shares. All the A preferred shares, and 12,420 of the B deferred shares were actually issued, and had been fully paid up. For some years past the company had not paid any dividends, but the accounts of the company shewed an excess of receipts over expenditure to the amount of £45,959 4*s.* 6*d.*, which, it was said, was now available for payment of a dividend. That sum did not exist in the shape of cash in the coffers of the company, but had been applied in extending the company's mains, and in the construction of other productive

works, being purposes for which the capital of the company was applicable. Under those circumstances the directors issued a report dated the 10th of April, 1889, in which they set out a series of resolutions, adopted by the board, to the effect following:—That the directors had resolved to raise, by way of further charge on the property and assets of the company, the sum of £100,000, and that £30,000 of such second charge should be allocated by way of dividend of £1 per share, free of income tax, on the A preferred shares; that the said £30,000 should be divided into bonds of £50 each, and bonds of £100 each, with coupons attached, bearing interest at £5 per cent. per annum, payable half-yearly, with a provision for the repayment of the bonds at par, by annual drawings, extending over thirty years; and that so many of the said bonds as might be necessary for the purpose should be issued direct to those shareholders whose dividends at £1 per share amounted to £50 and upwards. Then followed provisions as to the mode of application and payment of the proposed dividend to shareholders whose dividends did not amount to £50. The directors further recommended the payment of a dividend of £1 per share, free of income tax, in respect of the A shares, such dividend to be distributed in the mode provided by the resolution of the board applicable thereto. Along with the report, notice was given that the ordinary meeting of the company would be held on the 24th of April, 1889, to receive the report; to declare a dividend; and to transact the ordinary business of the company. The meeting was accordingly held, and a resolution was passed:—"That the report of the directors, and the accounts submitted therewith be, and the same are hereby adopted, and that a dividend of £1 per share on the A shares of the company be, and the same is hereby sanctioned, free of income tax, in accordance with the report of the directors." The Plaintiff, who was the holder of 355 A shares and 50 B shares, was not present at the meeting, but upon being informed of what had been done, expressed to the officers of the company his objections to the resolution. On the 4th of June, 1889, he received a circular offering him debentures in accordance with the resolution, and thereupon he, on behalf of himself and all other the shareholders in the company, brought this action for

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an injunction to restrain the company from acting on the resolution to which he objected, on the ground that it contravened the articles of association of the company. Those articles were, so far as material, as follows:—

"Dividends.

"101. The directors may, with the sanction of the company at the ordinary general meeting, declare a dividend to be paid to the members in proportion to their shares, subject, however, to the provision contained in article 105 of these presents, and the next succeeding article.

"102. No dividend shall however be declared to be paid to the proprietors of B deferred shares, unless and until the net profits of the company for the current year shall have enabled the directors to declare and pay to the proprietors of A deferred shares a preferential dividend after the rate of £6 per cent. per annum for that year. And after the proprietors of B deferred shares shall have been paid a dividend equal to £6 per cent. per annum for the same current year, the residue, if any, shall, subject to the provisions contained in article 105, be equally divided between both classes of shareholders *pari passu*, in proportion to the amounts called and paid upon their respective shares.

"103. They may also as, and when they think fit, pay to the members half-yearly an interim dividend in advance or on account of any yearly dividend estimated by them to be payable to the shareholders in respect of the net profits of the company during that current year, subject, however, to the provisions hereinafter contained with respect to the reserve and sinking funds respectively.

"104. No dividend shall be declared or payable except out of the profits arising from the business of the company, and no unpaid dividend or interest shall ever bear interest as against the company.

"105. The directors may set aside out of the profits or receipts of the company such sum as they may think proper to a fund to form a 'sinking fund' for the redemption of capital, or to a fund to be called 'the contingency fund,' for the purpose of meeting any unforeseen or prospective liabilities, and may, further, out of the said profits set aside such sum as they may think proper as a

reserve fund for equalizing dividends or for any other purposes of the company; and the directors may invest the sums so set apart upon such securities as they may select, except in the purchase of the shares of the company."

Buckley, Q.C., and *F. B. Palmer*, for the motion :—

No dividend has been paid upon the shares in this company up to the present time. The language of the articles of association in reference to the declaration and payment of dividends is quite plain. The meaning of it is that the directors are to pay them. In the ordinary sense of the word "pay" they are to hand over a sum of money to each shareholder. The proposal of the directors is inconsistent with the articles of association, and the articles alone are what the Court has to consider: *Oakbank Oil Company* v. *Crum* (1). The directors propose to give bonds with a right to be paid off by an annual drawing, and a right to interest until paid off, and that is directly contrary to art. 104. It is for the Court to declare how the profits arising from the undertaking shall be divided. The declaration that bonds shall be given instead of dividing the profits is *ultrà vires*. There was no contract with the shareholders to pay them a dividend in shares or bonds, and the shareholders have a right to say that they are entitled to be paid their proportion of the profits, and to refuse to have issued to them bonds, as a dividend, for the nominal value of £100, which as alleged, are worth only £90 in the market. The proposal of the directors may be said to be a compulsory loan by way of declaration of a dividend at present, but payable at an uncertain period in the future. The facts in the case of *Hoole* v. *Great Western Railway Company* (2) are different from those here, but the doctrine laid down in that case is applicable to this. The Plaintiff confidently asks for an order to prevent the resolution being carried into effect; the scheme proposed being quite inconsistent with the articles of association.

Hastings, Q.C., and *Kirby*, for the company :—

The proposal of the directors if carried out will be a payment of a dividend, but, no doubt, it will be postponed. The

(1) 8 App. Cas. 65. (2) Law Rep. 3 Ch. 262.

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case of *Hoole* v. *Great Western Railway Company* (1) is very different from this, and does not affect it at all, as the company here propose to give an acknowledgment of indebtedness to the shareholders which will enable them to receive their moneys, though it may be subject to the liability of allowing a small discount. The bonds will, there can be no doubt, be negotiable instruments should any shareholder want his money, but if he can wait until the company can pay him off he will receive the full amount, with interest. The proposed method of payment by the directors is the only one by which they can secure to the shareholders for the time being the profits which have been realized.

[STIRLING, J.:—The directors are compelling the shareholders to make a forced loan, as the dividend bonds are not payable immediately, but at an uncertain time.]

There is nothing illegal in what the directors propose to do. The company have earned the profits, but their position is such that they cannot pay them in a dividend now, having sunk them in executing new works, which will no doubt be of great advantage to the company in the future. The Plaintiff asks in effect that the company shall not declare a dividend now, simply because they are not able to pay in cash; but the company have power to declare a dividend out of the profits which have been earned. The shareholders are entitled to the profits—the result of the year's operations—and they ought not to be deprived of them at the instance of the Plaintiff simply because the company have not got the moneys in their coffers. There is nothing in the proposal of the directors which will bear more hardly upon one shareholder than upon another. There is nothing contrary either to the law or to anything contained in the Act of Parliament, and the proposal is not prohibited by the articles of association. The company have power to borrow moneys, but it was convenient, instead of doing so, to apply the profits towards the construction of new works, and thus prevent the necessity of borrowing. Such a proposal is for the benefit of the shareholders. The case of *Oakbank Oil Company* v. *Crum* (2) is quite in point, as here there are profits, but not in the coffers of the company,

(1) Law Rep. 3 Ch. 262. (2) 8 App. Cas. 65.

having been expended in new works. The motion ought to be refused.

Buckley, in reply.

1889. June 22. STIRLING, J. (after stating the facts set forth above, continued):—

Before going further I think it is desirable that I should indicate the precise point which I have to decide. It was not disputed that profits available for the payment of a dividend by the company had been actually earned. I have not, therefore, to deal with any of the questions which formed the subject of decision or discussion in the recent case of *Lee* v. *Neuchatel Asphalte Company* (1). Neither was it disputed that the company had power to create a charge on the assets of the company, or to raise money by means of such charge, or to apply the money so raised in payment of a dividend. The question, simply, is whether it is within the power of a majority of the shareholders to insist against the will of a minority that the profits which have been actually earned shall be divided, not by the payment of cash, but by the issue of debenture-bonds of the company bearing interest at £5 per cent. and repayable at par by an annual drawing extending over thirty years. It is to be inferred from the terms in which the bonds are offered for subscription that the company cannot issue them in the open market except at a discount of at least £10 per cent. Now the rights of the shareholders in respect of a division of the profits of the company are governed by the provisions in the articles of association. By sect. 16 of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), the articles of association "bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act." Sect. 50 of the Act provides the means for altering the regulations of the company contained in the articles of association by passing a special resolution, but

(1) 41 Ch. D. 1.

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no such resolution has in this case been passed or attempted to be passed; and the question is, whether this is a matter as to which the majority of the shareholders can bind those shareholders who dissent. The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other; and the question which I have just stated must, in my opinion, be answered in the negative if there be in the articles a contract between the shareholders as to a division of profits, and the provisions of that contract have not been followed. That appears to have been distinctly laid down with reference to the very matter in question by the Earl of *Selborne* in the case of the *Oakbank Oil Company* v. *Crum* (1), where his Lordship said (2):—"It appears to me that directors and general meetings of companies of this sort can have no powers by implication except such as are incident to, or properly to be inferred from, the powers expressed in the memorandum and articles of association. Their powers are entirely created by the law and by the contract founded upon the law which enables such companies to be constituted. Therefore I think the word 'may' means, that if the directors get the assent of a general meeting they may declare a dividend; but that is not to be any kind of dividend, it is to be a dividend of that kind which the clause contemplates." That then brings me to consider whether that which is proposed to be done in the present case is in accordance with the articles of association of the company. Those articles provide (101) that the directors may, with the sanction of a general meeting, declare a dividend to be paid to the shareholders. *Primâ facie* that means to be paid in cash. The debenture-bonds proposed to be issued are not payments in cash; they are merely agreements or promises to pay: and if the contention of the company prevails a shareholder will be compelled to accept in lieu of cash a debt of the company payable at some uncertain future period. In my opinion that contention ought not to prevail unless there be a context which shews that which I have said is the *primâ facie* meaning of art. 101 is not the true meaning, otherwise the shareholders will be deprived of the right to which every one is

(1) 8 App. Cas. 65. (2) 8 App. Cas. 71.

entitled under our law of disclaiming or refusing acceptance of every species of property not being property cast upon him by operation of law. The context, so far from being in favour of the Defendants' contention, appears to me to be decidedly against it. Art. 102 speaks throughout of dividends "to be paid" to the shareholders, and art. 104 provides that no unpaid dividend or interest shall bear interest against the company. It was said that that is merely a stipulation inserted in favour of the company and for the purpose of preventing shareholders from claiming as against the company interest on dividends. That argument appears to me to overlook what I have already pointed out, that the articles constitute an agreement between the shareholders *inter se*; but even if it were well founded the stipulation tends strongly to support the *primâ facie* meaning of art. 101. This view appears to me to be in accordance with that which was laid down by the Court of Appeal, at that time consisting of Lord *Cairns* and Lord Justice *Rolt*, in *Hoole* v. *Great Western Railway Company* (1). That case is, no doubt, not in all its features precisely similar to the present. It turned on the construction of an Act of Parliament, the language of which differs somewhat, though not, I think, materially, from that of the articles of association with which I have to deal. The property proposed to be divided among the shareholders consisted not of debenture-bonds, but of shares in the company, and those shares were to be issued at a discount. The decision of the Court of Appeal, however, was not, as I read it, rested on any of these distinguishing circumstances. Lord *Cairns* said (2): "Now, as regards the arrangement that is proposed, there are a certain number of persons whom it suits to increase their stake in the company, and to take shares; there are certain other persons (and it may be, the plaintiff is one) who do not wish to take shares, but wish to get whatever they are entitled to in the shape of money. If what was proposed was, that every shareholder should have an option to take shares at a certain price, or if he did not like that, to take his money, that (subject to the question I have passed from, as to allotting shares at a discount) would appear to be a perfectly equal arrangement, under which any

(1) Law Rep. 3 Ch. 262. (2) Law Rep. 3 Ch. 271.

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person who chose might take the shares, and any one who declined might receive his dividend in money, so that no complaint could be made on the ground of unfairness. But the offer made is substantially this—you, shareholder A., must either take this £100 share as worth £100, although it is not worth so much, or you must wait for that indefinite period mentioned in the report, at which it is expected there will be money to pay the shareholders in cash. There, again, as it appears to me, the company are involved in a dilemma; either these shares are assets available for the purpose of paying the dividend, or they are not. If they are not assets available for the payment of the dividend, they cannot be issued for the purpose of such payment. If, on the other hand, they are assets for that purpose, and the whole of the shareholders are not willing to take them *in specie*, it appears to me that every shareholder in the company who is so inclined has the clearest right to have them turned into money and to have the money rateably divided among the shareholders. If it be said in answer, that the assets cannot be turned into money because they are not at present saleable except at a discount, but will hereafter be saleable at their full value, then the rejoinder is that every shareholder has a right to say they shall be kept until the time arrives when they will be saleable at their proper value. It appears to me that it is impossible to escape from the conclusion that, if saleable, they must be sold for the equal benefit of all, and if not saleable must be kept for the equal benefit of all." And Lord Justice *Rolt* said (1): "What the directors do allege is this: that in the course of the current half-year in which the profits were being made, and while they were being made, they spent some of what they call their revenue in satisfying capital purposes, and then when they came at the end of the half-year to declare the dividend, they proposed to ascertain the profit without deducting that money which, during the currency of the half-year, they had expended for capital purposes. That is a very different question; and even if the case had been, that, as to the shares they were about to issue, they proposed to have the calls paid by the public to whom they were to be issued, and to appropriate the money to make good the sums which they had

(1) Law Rep. 3 Ch. 276.

expended for capital purposes during the currency of the half-year, I should very much doubt whether that would have been a lawful appropriation of the money raised by the shares. But they do not propose to sell the shares, they propose instead to offer the option of these shares to the shareholders, who, it is said, are entitled to a dividend, and to let them take these shares at par if they think fit so to do, and leave the other shareholders to wait the opportunity of being able to settle their claims." And further on his Lordship said: "I give no opinion upon the question whether the shares could be issued to be sold at a discount; but, supposing they could, this further question arises, whether the company, instead of selling the shares and dividing the money rateably among the shareholders towards payment of their dividends, could offer the shares to those shareholders who liked to take them at their full nominal amount in satisfaction of their dividends. I am of opinion that such a proceeding was illegal, and not an arrangement as to which the majority could bind the minority. . . . I think (1) that under a direction to apportion, appropriate, and pay the net revenues amongst all the shareholders rateably, the offering to the shareholders in lieu of the dividend shares which some shareholders will take and others will not take, is entirely beyond the power of the company; and that any one who declines to accept them may say: 'This is not a payment within the meaning of the Act; you are not proposing to pay anybody; you are, indeed, proposing to give a thing that may be sold in the market, but you are not proposing to give that which we are bound to take, you give us an option to take it, to some of us it may be beneficial to accept the option, to others it may not be so; the offering such an option is not a payment of the apportioned share of net profits, and is beyond your power—we decline to accept it, and we ask the Court to interfere to prevent its being offered to others.'"

Mutatis mutandis these remarks seem to apply to the issue of the debenture-bonds of the Defendant company. It was said that nothing could be more reasonable than that this company should be able to pay dividends in the manner proposed, or by the division in specie of assets of the company, *e.g.*, fully paid-up

(1) Law Rep. 3 Ch. 277.

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shares in another company held by the Defendant company. With those considerations, however, I have nothing to do. They might properly have been weighed by the framers of the articles of association: they may possibly be fit to be submitted to the shareholders of this company, if and when they are invited to consider the propriety of altering the regulations of the company under sect. 50 of the *Companies Act*, 1862. What I have to determine is, whether that which is proposed to be done is in accordance with the articles of association as they stand, and, in my judgment, it is not, and therefore the Plaintiff is entitled to an injunction so far as relates to the payment of dividends until the hearing of the action, or further order, and the costs of the motion will be costs in the action.

Solicitors: *Turner & Hacon; Slaughter & May.*

T. F. M.

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[1888 W. 3546.]

Appointment—Revocation—Special Power—Appointment by Will—Subsequent inconsistent Appointment by Deed with Power of Revocation—Will speaking from Death—Effect of Will—"Contrary Intention"—General and particular Intention—Election—Wills Act (1 *Vict. c.* 26), *ss.* 19, 23, 24, 27 [*Revised Ed. Statutes, vol. viii. pp.* 34, 35].

By a settlement made in 1842 on the marriage of a female infant, the husband and wife covenanted that as soon as the wife attained twenty-one certain real estate to which she was entitled as tenant in tail, and certain personal property belonging to her, should be conveyed and assigned to trustees upon trust after the death of the wife for the children of the marriage as the husband and wife by deed, or the survivor of them by deed with or without power of revocation and new appointment, or by will, should appoint, and in default of appointment in trust for the children of the marriage in equal shares—and by the same settlement the husband assigned a policy of assurance upon his own life to the trustees upon the same trusts.

The joint power of appointment was never exercised, and the wife died in 1857, without having executed any disentailing assurance of the real estate. Her eldest son entered into possession of the real estate as tenant in tail. In 1864, the husband, by deed reciting that the eldest son was

the heir in tail of his mother, appointed all the trust funds comprised in the settlement, other than the real estate, to the four younger children, and reserved to himself a power of revocation and new appointment by deed or will. The trustees then divided the trust funds, with the exception of the moneys secured by the policy, between the four younger children.

In 1869 the husband by will, in express exercise of the power contained in the marriage settlement, appointed specific sums of money to the eldest son and three of the younger children, and appointed the residue of the settlement funds to the eldest son.

In 1878, by deed, reciting the deed of 1864, the division amongst the four younger children, and that the moneys secured by the policy were the only fund remaining subject to the trusts of the settlement, the husband, in exercise of the power reserved by the deed of 1864, revoked the appointment thereby made, and appointed the policy moneys in equal fifths between his eldest son, his three surviving younger children, and the three children of a deceased younger child, and again reserved to himself a power of revocation.

In 1883 the husband by deed made the appointment of 1878 in favour of his eldest son, irrevocable, and in 1888 the husband died.

Upon a summons to obtain the opinion of the Court as to who were the persons entitled under the settlement:—

Held, first, that the date of the husband's will being before that of the deed of 1878 there was sufficient evidence of "a contrary intention" within sect. 24 of the *Wills Act*, and consequently that the will did not speak from the death of the testator so as to revoke the appointment by that deed:—

Held, secondly, that as the deed of 1878, although removing four-fifths of the fund from the operation of the will, did not purport to revoke it, the will under sect. 19 of the *Wills Act* remained in force, and operated as to the one-fifth ineffectually appointed by the deed of 1878 to the grandchildren of the testator:—

Held, thirdly, that, having regard to the intention shewn by the appointor in the deed of 1878, the eldest son was not bound to elect between the real estate which devolved on him as tenant in tail, and the interest appointed to him by that deed; but that he was bound to elect between such real estate and the benefits derived by him under the will, inasmuch as the will took effect by the operation of law and independently of the intention of the testator.

ADJOURNED SUMMONS.

This was a summons by the executors of the last surviving trustee of an indenture of settlement, dated the 31st of January, 1842, and made upon the marriage of Rev. *Francis Ballard Wells* and *Jane Rose Fanny* his wife, to obtain the opinion of the Court as to who were the persons entitled to the funds remaining subject to the trusts of the settlement and in what shares and proportions.

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At the date of the settlement, Mrs. *Wells* (then *Jane Rose Fanny Hardisty*) was an infant; and by the deed of settlement Mr. *Wells*, as to his own acts and deeds and those of persons claiming under him, and Mrs. *Wells* as to her own acts and deeds and those of persons claiming under her, covenanted that as soon as conveniently might be after Mrs. *Wells* should have attained twenty-one years certain parts or shares of real estate, to which she was tenant in tail, and certain personal estate, to which she was entitled, should be conveyed and assigned to the trustees of the settlement upon the trusts thereinafter declared, and by the same indenture Mr. *Wells* assigned to the trustees a policy of assurance on his life for the sum of £3000, and the moneys thereby secured and which might become payable thereunder, upon trust to invest the same, and to stand possessed thereof upon the trusts in the said indenture declared, which (so far as material) were trusts after the death of Mrs. *Wells* for all and every or such one or more exclusively of the other or others of the children of the marriage as Mr. and Mrs. *Wells* should by deed appoint, and in default of such appointment then as the survivor of them "by any deed or deeds, writing or writings, with or without power of revocation and new appointment to be by him or her sealed and delivered in the presence of two or more credible witnesses or by his or her last will and testament in writing" should direct or appoint, and in default of such last mentioned appointment in trust for all and every the children or child of the marriage who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain such age or respectively marry under that age, equally to be divided between them. The marriage was duly solemnized; no appointment was ever made in exercise of the joint power reserved to Mr. and Mrs. *Wells*; and Mrs. *Wells* died on the 5th of April, 1857. There were six children of the marriage, viz., *Rose*, who died an infant and unmarried in 1864, the Defendant *William Howley*, the eldest son and heir-at-law of Mrs. *Wells*; *Frances*, who married in 1867 the Defendant *John Duncan Cameron*, and died in 1871 intestate, leaving three children who were still infants and were Defendants, the Defendant *Francis John*, and two other daughters who were Defendants, viz., *Mary Julia*, who in 1886 married the

Defendant *Charles Outen Fulbrook*, and *Charlotte Anne*, who in 1872 married the Defendant *Martin Thomas Friend*.

No disentailing deed of the shares of real estate by the settlement covenanted to be conveyed to the trustees thereof was ever executed by Mrs. *Wells*, and on her death the Defendant *W. H. Wells* became entitled thereto as tenant in tail; and ever since her death he had been in possession thereof.

By a deed-poll dated the 27th of July, 1864, and duly executed and attested, Mr. *Wells*, after recitals to the effect (*inter alia*) that Mrs. *Wells* had died without having barred her estate tail in the above mentioned parts or shares of real estate, and that the Defendant *W. H. Wells* was her heir in tail, it was witnessed that Mr. *Wells*, in exercise of the power contained in the indenture of settlement of the 31st of January, 1842, directed and appointed that all the trust funds and premises comprised in or subject to the trusts of the said indenture of settlement other than the real estate of which Mrs. *Wells* was tenant in tail (including therein the proceeds of sale of part of such real estate which had been sold, and the income thereof), should thenceforth remain and be in trust for such of them the said *Frances Wells, Mary Julia Wells, Charlotte Anne Wells*, and *Francis John Wells*, as being a son should attain the age of twenty-one years, or being daughters or a daughter should attain such age or should respectively marry under that age, equally between them, if more than one, as tenants in common; and it was thereby provided that it should be lawful for Mr. *Wells* by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be executed as therein mentioned, or by his last will and testament in writing, or any writing in the nature thereof, or any codicil thereto, to revoke all or any of the trusts thereinbefore declared, and by the same deed or deeds, writing or writings, or by any other deed or deeds, writing or writings, executed as aforesaid, with or without power of revocation and new appointment, or by his last will and testament in writing, or any writing in the nature thereof, or any codicil thereto, to appoint or declare any new or other trusts for or for the benefit of some or one of the children of the marriage of or concerning the premises the trusts whereof should be so revoked.

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After the execution of this deed-poll the trustees of the settlement divided the whole of the trust funds comprised therein (with the exception of the moneys secured by the above-mentioned policy of assurance upon the life of Mr. *Wells*) equally between the four children named in such deed-poll, and upon the occasion of the payments to each of such four children of their respective shares they severally executed releases to the trustees of the settlement from all claims and demands in respect of any part or share of any fund subject to the trusts thereof, or on account of any trust, matter, or thing relating to the settlement antecedent to the dates of the several releases respectively.

Mr. *Wells* duly made his last will, dated the 3rd of September, 1869, and thereby, after reciting that, under the settlement made on his marriage with his late wife, certain sums of money were settled upon the trusts in the said settlement mentioned, and that the settlement contained a power enabling him either by deed or deeds executed as thereinafter mentioned, or by his last will and testament, to appoint and dispose of the said trust funds between and amongst his children in such proportions as he should think proper, the testator directed and appointed as follows:—"Now I, in exercise and execution of the said power and of all other powers enabling me in that behalf, do by this my last will and testament direct, limit, and appoint that the trustees or trustee for the time being of the said settlement shall pay, assign, and transfer the sum of £781 to my son *William Howley Wells*, his executors, administrators, and assigns, the sum of £650 to each of my daughters, *Mary Julia Wells* and *Charlotte Anne Wells*, and the sum of £1100 to my son *Francis John Wells*, and I further appoint the residue of the said trust fund to and in favour of my son the said *William Howley Wells*, his executors, administrators, and assigns."

By a second deed-poll, duly executed and dated the 15th of March, 1878, after reciting (*inter alia*) the deed-poll of the 27th of July, 1864, the death of Mrs. *Cameron* leaving three children, the division as above mentioned amongst the four children named therein, and that the only fund then remaining subject to the trusts of the settlement of the 31st of January, 1842, was the sum of £3000 secured by the policy on his life and the

bonuses thereon, Mr. *Wells*, in exercise of the power by the deed-poll of the 27th of July, 1864, reserved to him, and of every other power, revoked, determined, and made void the appointment in the last-mentioned deed-poll contained, and the trusts and provisions in the same deed-poll declared concerning the premises thereby appointed, and, in further exercise of the power by the same deed given to him and of every other power, directed and appointed that the sum of £3000 to become payable under the said policy should be held by the trustees of the settlement upon trust to pay one-fifth part to the Defendant *William Howley Wells*, one other fifth part to the Defendant *Mary Julia Fulbrook*, one other fifth part to the Defendant *Charlotte Anne Friend*, one other fifth part to the Defendant *Francis John Wells*, and that the said trustees should hold the remaining one-fifth part in trust for the three children of the said *Frances Cameron* in manner therein mentioned; and secondly, that all bonuses in respect of the said policy should be paid to the Defendant *William Howley Wells*. And by the deed-poll now in statement it was provided that it should be lawful for Mr. *Wells*, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be executed as therein mentioned, or by his will and testament, or any codicil thereto, to revoke all or any of the trusts thereinbefore directed, and to appoint or declare any new or other trusts to or for the benefit of some or one of his children of and concerning the premises the trusts whereof should be so revoked.

By a deed-poll duly executed, and dated the 17th of November, 1883, Mr. *Wells* released the appointment made by the deed of the 15th of March, 1878, in favour of *William Howley Wells*, from the power of revocation and new appointment therein contained, and directed and appointed that the appointment by the deed-poll of the 15th of March, 1878, made in favour of *William Howley Wells*, should be final and irrevocable, and take effect accordingly; and it was declared that nothing therein contained should prejudice or affect the power of revocation and new appointment contained in the deed-poll of the 15th of March, 1878, so far as the same extended to appointments thereby made other than that made in favour of *William Howley Wells*.

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Mr. *Wells* died on the 21st of March, 1888, and his will was proved on the 24th of July, 1888.

Buckley, Q.C., and *H. King*, for the Plaintiffs, stated the facts of the case.

Hastings, Q.C., and *Prior*, for the Defendant *William Howley Wells*:—

The will operated at any rate as to the one-fifth share, which the testator, by the deed of 1878, purported to appoint to the children of Mrs. *Cameron* who were not objects of the power. Having regard to the recitals in the deeds of 1864 and 1878, and to the releases executed, there can be no case of election as against *William Howley Wells*.

Warrington, for the appointees under the deed-poll of the 15th of March, 1878, other than *William Howley Wells* and the infant children of Mrs. *Cameron*:—

It must be conceded that if the will had been made after the deed-poll of March, 1878, it would have operated as an exercise of the power of revocation and new appointment contained in that deed, for it refers to the original power, and disposes of all the property subject thereto in a manner inconsistent with the appointment by deed: *Sugden* on Powers (1). Then, under sect. 24 of the *Wills Act*, every will is to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. Here there is no contrary intention apparent on the will: the testator died in 1888, and the will, though dated before the deed, must take effect as if it had been dated after it, and consequently must operate as an exercise of the power. Accordingly the will, speaking from the death of the testator, is a final exercise of the power, and is the governing document, except as regards the appointment to *William Howley Wells* in the deed-poll of the 15th of March, 1878, which was made irrevocable by the deed-poll of November, 1883: *Airey* v. *Bower* (2). *William Howley Wells* must therefore elect between the real estate which he took

(1) 8th Ed. pp. 278, 290.

(2) 12 App. Cas. 263.

against the settlement as tenant in tail upon his mother's death without having disentailed, and the benefits which he took under the settlement by means of the appointment of 1878 in exercise of a power contained in the settlement.

Henry Fellows, for the trustees of the settlement on the marriage of Mr. and Mrs. *Cameron*, and for the infant children of the marriage:—

It cannot be contended that the infant children of Mrs. *Cameron* take under the appointment of 1878, for they are not objects of the power; but the one-fifth ineffectually appointed in their favour by the deed of 1878, was effectually appointed by the will; and *William Howley Wells* is put to his election between the real estate, and the benefits given to him by the will.

Method, for Mrs. *Fulbrook*, and Mr. and Mrs. *Friend*, and their trustees:—

The will could not be a revocation of an appointment which was non-existent at its date. An intention to revoke a subsisting appointment is essential to the valid exercise of a power of revocation and new appointment: *Pomfret* v. *Perring* (1); *Griffiths* v. *Gale* (2). The *Wills Act* does not operate with regard to special powers in the same manner as it does with regard to general powers: *In re Ruding's Settlement* (3).

Warrington, in reply:—

In re Ruding's Settlement was overruled by *Boyes* v. *Cook* (4) and *In re Clark's Estate* (5). A power of revocation may be exercised by an instrument which does not expressly refer to the power: *Cooper* v. *Martin* (6).

Hastings, in reply upon the question of election:—

The doctrine of election depends upon intention: *In re Vardon's Trusts* (7); and the recitals in the deed-poll of the 15th of March, 1878, shew clearly that the appointor intended that no case of election should arise.

(1) 5 D. M. & G. 775.
(2) 12 Sim. 354.
(3) Law Rep. 14 Eq. 266.
(4) 14 Ch. D. 53.
(5) Ibid. 422.
(6) Law Rep. 3 Ch. 47.
(7) 31 Ch. D. 275.

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Aug. 7. STIRLING, J. (after stating the facts of the case, continued):—

The first question is whether the will of 1869 executed the power of revocation contained in the subsequent deed-poll of the 15th of March, 1878. The argument in support of the contention that it did, is based on two propositions: first, that if the will had borne date subsequent to the deed-poll, it would have operated as an execution of the power of revocation and new appointment; secondly, that by virtue of sect. 24 of the *Wills Act* the will, though dated before the deed-poll, speaks from the death of the testator, and has the same effect as if it had been dated subsequently to that deed.

Now as to the first proposition, the case of *Pomfret* v. *Perring* (1) establishes that an instrument which exercises a power of revocation and new appointment must shew, not merely an intention to appoint, but an intention to revoke the subsisting appointment. In that case the donee of a special power under a settlement, to be exercised by deed or will, partially exercised it by deed, reserving a power of revocation. Afterwards the donee made a will, and, by virtue of every power contained in the settlement, "or otherwise howsoever," appointed all the real and personal estate, which under the settlement, "or otherwise," she had power to appoint: and it was held that the will operated on the unappointed part only, and was not an exercise of the power of revocation and new appointment.

In that case *Knight Bruce*, L.J., said (2): "I apprehend that it is not according to the true import or correct interpretation of the words used by the testatrix to say, that they exhibit of themselves an intention to exercise a power of revocation. But if the will shews an intention to have existed, which, without so construing them, cannot be effectuated, they may certainly be so construed. I conceive, however, that the will here does not shew such an intention. Every word of the instrument may, in my opinion, be satisfied without ascribing to the testatrix any idea of dealing with the power of revocation or the property subjected to it."

Then *Turner*, L.J., said: "Here an actual appointment has been made with a power of revocation, and that appointment was

(1) 5 D. M. & G. 775. (2) 5 D. M. & G. 780.

to be undone, before the power of new appointment would arise. To shew that a power of this description has been exercised, it is not, I think, enough to shew an intention to appoint; an intention to revoke the former appointment ought, I think, also to be shewn. The principles acted on in other cases, with respect to the exercise of powers, seem to me to apply to this. If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that power. I think it clear that an intention must be shewn to revoke and undo what has been already done."

It appears, therefore, that, in the words of *Turner*, L.J., "the intention to revoke and undo what has been already done," may either appear by the express terms of the instrument or be inferred from the circumstances that the will would otherwise be ineffectual. This agrees with what is laid down by Lord *St. Leonards* in the passage cited from his treatise on Powers (see *Sugden* on Powers (1)); and by Lord *Cairns* in *Cooper* v. *Martin* (2).

The foundation, however, for such inference is this: that no other explanation can be given of the language used by the donee of the power.

In the present case, if the will of 1869 had borne date subsequently to the deed-poll of 1878, I am unable to see how effect could be given to it except by means of an exercise of the power of revocation contained in the deed-poll; and consequently I think that, in that event, the intention to exercise that power might have been inferred.

In my opinion, therefore, the first of the two propositions is well-founded.

(1) 8th Ed. p. 290. (2) Law Rep. 3 Ch. 47, see p. 56.

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The second proposition assumes that sect. 24 applies to wills made in the exercise of a special power of appointment, such as is contained in the settlement of 1842. Now, that power is one of selection and distribution. The property affected by it is vested in the trustees of the settlement. The office of a will made in exercise of the power is, not to pass that property, but to indicate to the trustees which of the children of the marriage are to enjoy the property beneficially, and in what shares and for what interests: and the will operates and takes effect by being read into and becoming part of the settlement. The question then arises, whether such a will can be said to "comprise" the property subject to the trusts of the settlement.

I have been unable to find any decision which enables me to answer that question either way. Certainly the cases of *Boyes* v. *Cook* (1) and *Airey* v. *Bower* (2), which were referred to in the argument, do not cover the point. Both of them relate to general powers of appointment. They establish that a will containing a general devise or bequest operates (unless a contrary intention appears by the will) as an exercise of a general power of appointment created (even by the testator himself) subsequently to the date of the will; but this conclusion does not rest on sect. 24 of the *Wills Act* alone; it is arrived at through the combined operation of sects. 24 and 27. Now the language of sect. 27 is remarkable. It relates to general powers, and provides that "a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may

(1) 14 Ch. D. 53. (2) 12 App. Cas. 263.

think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

It was thought necessary, therefore, to provide, not merely that the general devise or bequest should operate as an exercise of the power, but that it should be construed to "include" (which seems to be equivalent in meaning to "comprise") the real or personal estate subject to the power.

This seems to have been done for the purpose of making sect. 24 applicable.

In *Airey* v. *Bower* (1) the Lord Chancellor appears to allude to this when he speaks of the Legislature having provided that a general power of appointment should be treated as the property of the testator.

None of this reasoning applies to special powers. It is, however, unnecessary in this case to decide whether sect. 24 applies to a will made in exercise of a special power such as exists in the settlement of 1842; for I have come to the conclusion that, even if it does, still the consequences sought to be deduced do not follow.

The question, it is to be borne in mind, is whether the testator has shewn an intention not merely to appoint the fund, but also to revoke an appointment actually made. Apart from the section of the *Wills Act*, no such intention could be inferred where the will bears a date prior to that of the instrument which reserves the power of revocation. Sect. 24 provides that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." That is a very different thing from saying that the will is for all purposes to speak and take effect as if it had been executed immediately before the death of the testator. The question is one of intention, and of intention to undo what has been done; and, for the purpose of ascertaining the intention, I am entitled to look, not merely at the part of the will which immediately deals with the subject-matter, but also at any other part of the instrument, including the date; and the date appears to me to shew decisively that no intention

(1) 12 App. Cas. 263.

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to undo what was only done at a subsequent time can be attributed to the testator, and that his language is to be ascribed to a totally different cause. In my judgment the terms of the section are not such as to compel me to impute to the testator an intention which manifestly never existed in fact.

I am of opinion, therefore, that the will of 1869 does not operate to revoke the deed-poll of 1878.

That deed, however, purports to appoint one-fifth of the fund to the children of Mrs. *Cameron*, being grandchildren of the testator: and as the power only authorizes an appointment to children of the testator, the deed is to this extent ineffectual.

The next question is as to what becomes of this one-fifth share? Now the deed-poll of 1878, though it removes four-fifths of the fund from the operation of the will of 1869, does not purport to revoke that will: and although it can hardly be doubted that the testator, had he known the true effect of the deed of 1878, would have made some other disposition of the remaining one-fifth, yet sect. 19 of the *Wills Act* provides that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." It was hardly disputed, and I think properly, that as to this one-fifth, the will of 1869 remains in force, and that that share of the fund must go and devolve accordingly.

There still remains the question whether *William Howley Wells*, the eldest son and heir-in-tail of Mrs. *Wells*, is bound to elect between the real estate which devolved on him as such heir-in-tail, and the benefits coming to him under the deed-poll of 1878 and the will of the testator.

Now, the general intention of the author of every instrument is, no doubt, presumed to be that effect shall be given to every part of it; but such intention, to use the words of Lord Justice *Fry* in *In re Vardon's Trusts* (1), "may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention;" and such particular intention may obviously repel the general intention either wholly or in part.

In the present case there is not to be found in the settlement

(1) 31 Ch. D. 275, 279.

of 1842 any indication of a particular intention inconsistent with the general and presumed intention. Under that deed, however, *Francis Ballard Wells*, in the events which happened, had power to appoint the property subject to the settlement among the children of the marriage. It was open to him, I apprehend, expressly to direct that the benefits conferred by any appointment on *William Howley Wells* should in addition to those taken be by him as heir-in-tail of his mother: and such express directions, if actually given, would, on the principle of *In re Vardon's Trusts* (1), have excluded the doctrine of election. No express direction is to be found in the deed-poll of 1878: and the question is whether a like intention is not to be inferred.

Now, by the deed-poll of 1864 the testator took notice that the real estate covenanted by Mrs. *Ballard Wells* to be settled had devolved on *William Howley Wells* as her heir-in-tail: and he made an appointment under which *William Howley Wells* took no interest; and on the footing of this appointment a considerable portion of the trust funds was distributed.

By the deed-poll of 1878 the testator took notice of the deed-poll of 1864, and the distribution made in pursuance of it, and it is then recited "that the only fund now remaining subject" to the trusts of the settlement was the sum of £3000 secured by the policy, and upon that footing he proceeds to revoke the deed of 1864, and to make a fresh appointment under which *William Howley Wells* took a share of the policy moneys together with all the bonuses. I think the meaning of that is that what had previously been taken by *William Howley Wells* as well as by the other children was to remain undisturbed, and consequently that the appointor has shewn that particular intention which is sufficient to override the "presumed and general intention" so far as relates to any benefits derived by *William Howley Wells* under the deed-poll of 1878.

No such inference, however, can, as I think, be drawn with reference to the benefits derived by him under the will of 1869, which takes effect by the operation of law, and independently of the intention of the appointor.

(1) 31 Ch. D. 275.

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I think, therefore, that *William Howley Wells* is not bound to elect as regards any interest taken by him under the deed-poll of 1878; but that he is bound to elect as regards any interest which may be coming to him under the will of 1869.

Solicitors: *Hardisty, Rhodes & Hardisty; Vallance & Vallance.*

W. W. K.

In re BACH'S DESIGN.

KEKEWICH, J.

1889

June 5.

Patents, Designs, and Trade Marks Act, 1883, *s.* 47—*Design—Novelty—Different Material—Registration in different Classes.*

A design already on the register may be registered in another class for an article applied to a different purpose, but not for an article merely of a different material.

A design for a lamp shade made of china in the shape of a rose was registered in one class. A design for a lamp shade made of linen, also in the shape of a rose, had previously been registered in another class :—

Held, that though the materials were different, there was no novelty in the china design, which must, therefore (following *Le May* v. *Welch* (1)), be removed from the register.

F. W. BACH, a lamp manufacturer, on the 1st of April, 1886, registered in Class 4 (No. 46,391) the design of a shade in the form of a rose, made of china or porcelain, for what is called a fairy lamp. He, in 1888, brought an action in the Queen's Bench Division against the *Army and Navy Co-operative Society* for damages for infringement, and for an injunction to restrain them from infringing his copyright in the design. The defence was that it was not a new design; and on the 30th of October, 1888, the society moved in this Division to have the register of designs rectified by removing therefrom the said design, on the ground that it was neither new nor original. It appeared that other designs of shades in the form of roses made of linen had previously been registered; but the case principally relied on was that of *W. H. Reed*, who, on the 22nd of January, 1886, had registered under Class 12 a linen shade in the shape of a rose for candles, also adapted for lamps, and that these shades had been sold by *Reed* himself and by the *Army and Navy Co-operative Society* directly after the registration. Evidence was also given of lamp shades of china in the form of a tulip having been sold previous to the date of *Bach's* registration.

The motion now came on for hearing.

Aston, Q.C., and *Macrory*, in support of the motion, cited *Le May* v. *Welch* (1), and also *Smith* v. *Hope* (2).

(1) 28 Ch. D. 24. (2) 6 Rep. Pat. Cas. 200.

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Chadwyck Healey, and *Munroe*, for *Bach*:—

The linen design caught fire and was not suitable, and has not come into use. The material being china makes all the difference. A design for one purpose may be well registered as applied to other purposes. In the Scotch case of *Walker, Hunter, & Co.* v. *Falkirk Iron Company* (1) the registration of a design for mouldings to kitchen range doors of iron was held good; though a similar design had been previously applied to wooden doors of cabinets. Moreover the classes are different, and protection may thus be obtained according to the Act of 1883, s. 47, sub-s. 4: *Holdsworth* v. *M'Crea* (2); *Harrison* v. *Taylor* (3).

KEKEWICH, J.:—

To some extent this is a case of first impression. I entirely follow Mr. *Chadwyck Healey's* argument, that the appeal in a case of this kind is necessarily in the first instance, and in the last resort, to the eye; and on that appeal my eyes are against the Respondent to the present application. It seems that Mr. *Reed* designed a rose as a shade to a lamp, and he seems to have designed an exceedingly pretty thing. He applied one of the most elegant works of nature to the common purposes of domestic life with considerable success as far as appearance is concerned, though defective, no doubt, as Mr. *Chadwyck Healey* has pointed out, in utility, for obvious reasons. He registered it in a particular class. I will come back to that immediately. The Respondent, Mr. *Bach*, was minded to improve upon that, and in one sense he has improved upon it, that is to say, he has made a china shade for a lamp which is not open to the objection which affected the linen shade of Mr. *Reed*. That being so, Mr. *Bach* was able to improve upon it further by narrowing the aperture, and, as is suggested, increasing the illuminating power. I have no doubt that the suggestion is well founded; but the question is, did he or did he not adopt the design of Mr. *Reed*? That is the real question, and it is the question which is placed before me by the terms of the Act of Parliament, 46 & 47 Vict. c. 57, which says in sect. 47 that what may be registered is,

(1) 4 Rep. Pat. Cas. 390. (2) Law Rep. 2 H. L. 380.
(3) 4 H. & N. 815.

"Any new or original design not previously published in the *United Kingdom.*"

There is no evidence of publication here in the sense of sale before the 1st of April, 1886, when *Bach's* registration was made, and therefore I may dismiss the question of publication altogether; but still, apart from that, it is necessary in order to support the design that it should be new or original. To my mind it is extremely important, if one can, and as far as one can, to base a decision in a case of this kind on some principle, and I find a principle to my hand in the judgment of Lord Justice *Fry* in *Le May* v. *Welch* (1), in which he makes this remark: "The meaning of the words 'novel or original' is this, that the design must either be substantially novel or substantially original, having regard to the nature and character of the subject-matter to which it is to be applied." "Subject-matter," as there used by the Lord Justice, does not mean the material, but the purpose of the design, and the purpose here is precisely the same in each case; that is to say, the designer in each desired to invent or produce a lamp-shade. So that, as regards the subject-matter, they were proceeding on identical lines.

Now, that being the nature and character of the subject-matter, what is there substantially new or substantially original? I will dismiss the second alternative, and take the substantially new. If I appeal to my eye, and look at the specimens before me of the roses of Mr. *Bach*, there is some distinction seen between them and those of Mr. *Reed*, perhaps not more than one would expect to result from the difference in material, the one being more plastic, the other less so; the one necessarily taking a hard form, and the other lending itself to folds, and producing a softer effect. But I think I am entitled to look, and I certainly do look, at the design which was actually registered by Mr. *Bach*, which I have before me, and taking that, and looking from that to Mr. *Reed's* production, there seems to me to be so great a similarity that it is difficult to distinguish one from the other. There, in Mr. *Bach's* registered design, the hardness of his material is not shewn, and he has multiplied the leaves of the rose, and placed them in such positions that they really are precisely

(1) 28 Ch. D. 35.

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the same as those of Mr. *Reed*. That being so, why should I not hold that the design is the same? It seems to me, as a matter of eyesight, that the design is precisely the same.

A case in the Scotch Courts, *Walker, Hunter, & Co.* v. *Falkirk Iron Company* (1), mentioned by Mr. *Chadwyck Healey*, shews that you may have a design used for cabinet doors and other doors, and yet well registered as applied to range fire-doors. I do not for a moment doubt the accuracy of that decision, nor do I doubt that it may be applied to many other cases; but here I have nothing of the kind. Here I have a design in one material applied, not to a different thing or to a different purpose, but to the same purpose as the previously registered design, namely to lamp shades.

Then Mr. *Munroe* appeals to the 4th sub-section of sect. 47, which says: "The same design may be registered in more than one class;" and that is perfectly true. There are many cases in the books in which the Court has upheld registration, as for cotton goods in one class, of a design which had already been applied to goods of a different character altogether in another class, and I do not think it necessary to hold or even to intimate that possibly the design of a rose may not be registered for some other entirely different purpose, that is to say, with reference to some other quality of goods in a different class. But the Act does not say, and I think cannot have intended to say, that by selecting a different class a man may register as applied to the same things, say lamp shades, what has been already registered with reference to that thing, lamp shades, merely varying the material in which the lamp shades have been made.

It seems to me that there really is no novelty in the design. There being no novelty in the design, it has not complied with the provisions of the statute, and the application must be granted with costs.

Solicitors for the Applicants: *Tyrrell Lewis & Co.*
Solicitors for the Respondent: *Alsop & Co.*

(1) 4 Rep. Pat. Cas. 390.

C. M.

COMBINED WEIGHING AND ADVERTISING COMPANY *v.* AUTOMATIC WEIGHING MACHINE COMPANY.

KEKEWICH, J.

1889 *July* 5.

[1888 C. 3697.]

Patent—Action to restrain Threats—Cross-action for Infringement—Costs—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

A solicitor's letter saying that proceedings will be instituted is a threat within the meaning of sect. 32 of the *Patents, Designs, and Trade Marks Act,* 1883.

The action for infringement pointed at by the section is an action by the patentee against the person whom he has threatened, not against any other person who may be infringing.

Where there is an action to restrain threats the defendant is not bound to assert his rights by defence or counter-claim, but is entitled to bring a separate action for the alleged infringement of his patent. But if he does so, arrangements ought to be made so that the proceedings in one action should be stayed to abide the result of the trial in the other.

A. commenced an action under sect. 32 of the *Patents, Designs, and Trade Marks Act,* 1883, against *B.* to restrain threats. *B.* within ten days brought a cross-action against *A.* for infringing his patent. After pleadings had been delivered and notice of trial given in both actions, *A.* offered to stay his action for threats until *B.'s* action was concluded; but *B.* refused, and forced *A.* to proceed, and both actions came on together for trial. *B.'s* action having been dismissed with costs :—

Held, (1) that, on the true construction of the section, *A.'s* right of action was taken away by *B.* having within a reasonable time commenced and prosecuted with due diligence his cross-action for infringement; and (2) therefore, that *A.'s* action must be dismissed, but, under the circumstances, without costs.

THE Plaintiff and Defendant companies were both proprietors of patents for improvements in weighing machines.

On the 21st of September, 1887, the Defendants instructed their solicitors to write to the Plaintiffs a letter which, omitting formal part, was as follows :—

"We are instructed by the *Automatic Weighing Machine Company, Limited,* to write to you on the subject of an automatic weighing machine exhibited by you at the *Bodega, Bucklesbury,* and elsewhere, which our clients state is an infringement of their patent.

"We have, therefore, to inform you that unless such machines

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are at once withdrawn from public exhibition, and destroyed, and unless you undertake that no more shall be manufactured, we are further instructed to commence proceedings for an injunction to restrain you from infringing our clients' patent, and for damages.

"We shall be glad to hear from you at your early convenience, and in the event of your refusal to comply with our clients' demands, be good enough to send us the names of your solicitors, who will accept service of process."

In reply the secretary of the Plaintiffs wrote as follows:—

"Your letter of yesterday's date received, which will be brought before the directors at our next meeting, and their decision shall be forwarded to you."

But without any further communication the Plaintiffs on the 27th of September, 1887, issued the writ in this action claiming an injunction to restrain the Defendants from representing or asserting that the Plaintiffs were infringing their patent.

On the 30th of September, 1887, the Defendants commenced a cross-action against the Plaintiffs, asserting the validity of their patent, and claiming an injunction to restrain the Plaintiffs from infringing the same, and consequential relief.

Pleadings in both actions were delivered, and on the 22nd of March, 1888, the Plaintiffs set down the Defendants' cross-action for trial, and on the 27th of April, 1888, offered to stay all further proceedings in their action until the Defendants' cross-action was concluded; but the Defendants refused to allow that course, and by notice dated the 2nd of May, 1888, threatened to apply to dismiss the Plaintiffs' action for want of prosecution if it were not proceeded with. The Plaintiffs accordingly, though urging that every point in their action was covered by the Defendants' cross-action, set down their action for trial and gave notice that they would ask for the costs occasioned thereby.

On the 11th of January, 1889, both actions came on together for trial before Mr. Justice *Kekewich*, when his Lordship held that the Plaintiffs had infringed the Defendants' patent, and gave judgment for the Defendants in their cross-action against the Plaintiffs; and accordingly this action, which was only formally opened, was dismissed with costs.

On the 3rd of May the Court of Appeal reversed the decision of Mr. Justice *Kekewich* in the Defendants' cross-action and dismissed it with costs, and remitted this action to his Lordship to be dealt with as he might think fit, the costs in the appeal to be costs in the action.

The action now came on to be heard.

Warmington, Q.C., *Morton Daniel*, and *Firminger*, for the Plaintiffs:—

The result of the Defendants' threats has been to paralyse our business so far, and unless the Defendants come within the proviso of sect. 32 in the *Patents, Designs, and Trade Marks Act*, 1883, we are entitled to restrain their threats by injunction and to an inquiry as to damages. The intention of the Act was to prevent the injury caused by threats. The proviso does not mean that if the person making threats brings an action at any time he will be protected. Our action was the first, and the proviso does not apply to this case because the Defendants did not bring and prosecute their action with due diligence: *Challender* v. *Royle* (1). We had to set down their action for trial. Further, the Defendants have caused unnecessary litigation and expense. They could have raised all the questions by way of defence or counterclaim to our action, instead of bringing a separate action; and then, when we offered to stay our action, they forced us on. We ought therefore to have the costs of this action.

Aston, Q.C., *Neville*, Q.C., and *R. Griffin*, for the Defendants:—

Under the old law a patentee was within his right in issuing threats: *Halsey* v. *Brotherhood* (2). Then sect. 32 of the Act of 1883 renders him liable for his threats if he does not commence an action and proceed with due diligence. When we sent the letter we had already commenced an action against one *Knight* for infringing our patent. Our so-called threats were the commencement of proceedings. There was no want of diligence on our part. They issued their writ while we were waiting for a reply to their letter, which was a device to mislead us. A solicitor's letter is not a threat within sect. 32. Lastly, the

(1) 36 Ch. D. 425. (2) 19 Ch. D. 386.

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Plaintiffs cannot complain of our having forced them on. They ought to have stopped their action directly we issued our writ. But they waited until all the pleadings and particulars of objections had been delivered and heavy costs incurred, and notice of trial given, and then they make their offer. But it was then too late.

Warmington, in reply.

KEKEWICH, J.:—

This is a case of some importance to all who are interested in patented inventions, and it is the more important because, although there have been some cases already determined on the 32nd section of the *Patents, Designs, and Trade Marks Act* of 1883, yet they have left open several questions; and this action not only touches some of those questions, but raises others which, as far as I know, are entirely new. I have already said that the section is a legislative puzzle, and I am not sure that the puzzle can be properly solved without the assistance of the Legislature. I cannot conceal from myself the probability that the Legislature has failed to express what was intended, but I do not propose to guess at what was intended. It is my duty to construe the section as it stands. The one thing to remark on this section, which is of a general character, by way of arriving at its true construction, is that it creates a new remedy. That is to say, before 1883 it was within the right of a patentee honestly, that is to say without doing anything otherwise than proper, to threaten with legal proceedings a person who, according to his view, was infringing the patent which he held, but the Act of 1883 says in this section that those threats shall give a right of action. The party aggrieved may commence an action and succeed in that action provided certain terms are complied with. That is a new remedy. It creates a new right of action. That one must bear in mind, and it is the key of course to the construction of the section.

The first point I have to consider is: was what was done in this case a threat within the meaning of the section? The section says "where any person claiming to be the patentee of an invention," and there is no doubt the Defendants here were

claiming to be patentees, "by circulars, advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture use sale or purchase of the invention," that shall give a right of action; and it is argued that that does not apply to a solicitor's letter to the offender telling him that unless he withdraws his manufacture from the market, or otherwise complies with the patentee's just demands, legal proceedings will be commenced against him. It was not argued that the patentee must do it himself: and he could not have very well done it in this case himself, because the owners of the patent were a corporation. Therefore, apart from that, there can be no doubt that the patentee may do it by an agent; and, if by an agent, why not by a solicitor as well as by any other agent? But a solicitor's letter saying proceedings will be instituted is said not to be a threat. But for the argument I should have been under the impression that legal proceedings could not have been threatened in a more direct or unmistakeable manner than by a letter from the solicitor who tells you, not that somebody else will, but that he will in due course issue a writ against you, and insist upon your appearing and litigating according to the forms of the Court. I think that is a sufficient answer to that objection. Then there was a question raised about the damages which might be recovered in such an action. That I will pass over, as in the view which I take of the case, it is not necessary for me to determine that question. Then the great questions arise on the proviso, introduced by way of modifying language which otherwise might, I think, have been reasonably plain. The proviso really introduces the whole difficulty, and I think it may assist the construction of the clause (I am sure it ought not to alter it) if I were to read the proviso into a different part of the section. It seems to me that the proviso might possibly have been introduced in the early part of the section in this way: The section might have said, without altering the construction, "Where any person claiming to be the patentee of an invention, and not with due diligence commencing and prosecuting an action for infringement of his patent, by circulars, advertisements, or otherwise, &c.," and that seems to me what must be the

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meaning of the proviso. It is said that a man does not commence an action for infringement of his patent, if, having a patent which is imitated in many different ways, he threatens one man and commences an action against another; and still more so if he threatens a man who is alleged to have infringed his patent in one way and commences an action against a man who is infringing his patent in an entirely different way. In this case the Defendants in this action were Plaintiffs in an action for establishing their patent and restraining infringement against one *Knight*, and that action was pending at the time the threats which were in question here were made, and they contended that they had commenced an action for the infringement of their patent. I cannot think that the Legislature intended anything of that kind. Such an intention would seem to me to be utterly at variance with the language used in the Act. I think the plain meaning of the language is that the action referred to must mean an action for infringement against the same manufacture, use, sale, or purchase, to which the threats relate. I do not understand either of the Lords Justices in *Challender* v. *Royle* (1) to actually have so decided, though I think the language of both points that way. Lord Justice *Cotton* says (2): "In my opinion the proviso is satisfied if an action to test the validity of the patent or the fact of infringement is honestly brought with reasonable diligence against the person or any of the persons to whom the threats have been made." And Lord Justice *Bowen*, after having said something to the same effect says (3): "I do not express any opinion as to whether any other sort of action would or would not satisfy the proviso." Now I can quite understand it being held (though it is not necessary to hold, and was not there held) that if the patentee commences an action against a man who is selling precisely the same article, or manufacturing precisely the same article, which is manufactured or sold by the threatened person, that might do. But I do not understand either of the Lords Justices to suggest that an action against an infringer of a different character would meet the exigency of the proviso. It is said that the Defendants here

(1) 36 Ch. D. 435. (2) 36 Ch. D. 439.
(3) 36 Ch. D. 442.

in commencing an action against *Knight* were endeavouring to establish the validity of their patent. That might be quite true; but if the Legislature had intended to say that the patentee shall have the benefit of the proviso, if he has taken proceedings to establish the validity of his patent, it could easily have said so in plain terms; but it has not said so. It says: "If he commences an action for the infringement of his patent." It is true that, in an action for infringement, the question of validity is generally raised. The Legislature has said it shall be an action for infringement. I think that means infringement of the same character as that which is threatened.

Then I come to what is the real difficulty in this case. These threats having been made, they were not followed up within nine days by an action; that is to say, an action to prevent the particular infringement. In the meantime the action for restraining the threats had been commenced. Mr. *Aston* does not hesitate to say that that was a trick, and ought not to be regarded as an honest action. I am not disposed to think it was a trick, and I am not disposed to regard it otherwise than as an honest action. Even supposing (which I am not persuaded is the fact) that there was any want of courtesy on the part of the solicitors in the matter, yet they might quite properly have advised their clients that they had better at once commence an action under this 32nd section to restrain the threats, and the Plaintiffs in that action might have thought that it was better to commence their own action, and not wait to see if those threats would be followed up. The Plaintiffs in the threats action, if I may so call it, might very well have thought that they were in the right, and that the patent was bad, or the infringement could not be proved, and that the sooner they stopped the threats and prevented the paralysis of their trade the better. I do not see any impropriety in their commencing the action. On the other hand, it seems to be impossible, even apart from authority, to hold that the patentees did not commence their action with due diligence when they commenced it within the fortnight after the threats were made. That lands me in a position of considerable difficulty. I find a Plaintiff properly commencing his action, and exercising the right which is given him by Act of Parliament, *rectus in*

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curiâ at the time of issuing his writ, then, possibly, if one construction of the Act should prevail, defeated by something entirely future which happens after his action is commenced, so that what was right on the 27th of September, becomes wrong on the 30th. The right of action given by the Legislature, and properly exercised at one time, is apparently on that construction taken away by the Legislature three days afterwards. It is a strange conclusion at which to arrive; but if the Legislature has so said in plain words, I have no other duty than to adopt the Legislature's express meaning. Now, has the Legislature so said? Having given that right of action, the section says: "It shall not apply if the person making such threats with due diligence commences an action for infringement of his patent." I hold that he has commenced his action with due diligence, and it is an action for infringement; and under those circumstances this follows: this section does not apply. It is a strange result, but the language, to my mind, is perfectly plain. I do not see any way out of it, though quite possibly the Legislature has failed to express that which it intended. It certainly has given with one hand a right of action, and taken it away with the other. Because, if my view is correct, a man may wait any reasonable time—and it is impossible to lay down any fixed rule, three months having been held to be a reasonable time—to see what is likely to come of the action founded on his threats, look up a little more carefully than he has hitherto done the question of the validity of the patent, and the details of infringement, and so forth, and may, within any reasonable time, commence his action for infringement and say, "You were right till this morning, but now you are wrong; I have commenced an action with due diligence, and there is an end of your case." However, that seeems to me to be the meaning of the Act of Parliament.

Now, as regards the question of prosecution, there is one fact, and one fact only, which is of any importance in this case. I do not pause to guess why the Legislature put in those words, "with due diligence commences and prosecutes," because when once an action has been commenced the defendant is able, if he is so minded, to press the plaintiff on; and, if the defendant is satisfied that he is right, or if there is any urgent reason for having

the action disposed of, he can at any rate do it sufficiently to prevent the action being dropped altogether, and prevent that result which otherwise would follow on his own action being got rid of. The Legislature has recognised the duty of the patentee not only to commence, but to prosecute with due diligence. It seems at a certain date the Defendants had set down the action for infringement for trial, and I recognise all that Mr. *Warmington* says on that point. I think, *primâ facie*, if you find an action set down by the Defendant, that is evidence, and cogent evidence, that the Plaintiff has not prosecuted his action with due diligence. But when I look into the dates and see what occurred, I find that the Defendants in the infringement action had been obliged to give, not only once, but for a second time, further and better particulars of their objections to the patent; and though I think that the Plaintiffs in that case might, with propriety, have taken a somewhat different course from what they did take as regards procedure, and delayed the setting down, still I do not think it would be right to allow the Defendants, who were in default as regards their particulars, to take advantage of the few days' delay in setting down the action for trial. That is really all that is to be said about the prosecution. I think I cannot hold that there has been any want of due diligence in the prosecution of that action. My conclusion, therefore, on the construction is that there were threats within the meaning of the section; that there was a proper action to restrain those threats; and that that right of action has been tolled by the operation of the proviso, there having been commenced and prosecuted with due diligence an action for the infringement of the patent. This, therefore, is a decision against the Plaintiffs here. Then I have to consider the question of costs. That has already been discussed in the Court of Appeal, and though, perhaps, the learned Judges did not direct their minds wholly to the question of costs, they did look into the matter, and they have left it to me to look into it further, and I have now here all the facts before me necessary for giving a decision. It is impossible to say that a patentee is bound to try the question of infringement, with validity, and so forth, by a counter-claim; but I think where there is an action to restrain threats, if the patentee does not choose to try the

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question in that way he ought at any rate to attempt to stay the action, and offer terms to get rid of the action founded on the threats. If he thinks it more convenient to have his own patent action for infringement, I think he ought not to allow the other action to go on without, at any rate, an endeavour to take care of that action, so that it may be kept on foot, if necessary, for the protection of the plaintiff in that action, and in the meantime that no unnecessary costs shall be incurred. I think the course that the patentees have taken here has been to oblige the Plaintiffs in the threats action to go on. Letters have been read to me which shewed that that was their intention; that they insisted upon having that action set down for trial and disposed of; and the Plaintiffs in the threats action are brought here because they so insisted. I think that is entirely their own fault, and if I could with propriety make them pay the costs I should be disposed to do so. I cannot do that. I dismiss the action, but I certainly shall dismiss it without costs.

Solicitors for Plaintiffs: *Perkins & Sawyer.*
Solicitors for Defendants: *Adam Burn & Son.*

H. L. F.

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July 12, 13, 20.

In re WEALL.
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[1886 W. 3591.]

Trustees—Solicitor—Costs improperly incurred—Costs of Action against Trustees.

The trustees under a will employed a solicitor to collect the rents, and allowed him to deduct from the rents certain costs. The tenant for life brought an action against the trustees, alleging that some of the costs were chargeable against *corpus* and not against income, and that other of the costs had been unnecessarily incurred. The trustees alleged that the tenant for life was aware of what had been done and had assented.

The Court thought that the tenant for life had not assented, and decided that the Defendants had been wrong throughout:—

Held, that the trustees must pay the costs of the action.

A trustee may select solicitors and agents; and so long as he selects persons properly qualified, he cannot be made responsible for their intelli-

gence or their honesty; but he cannot entrust them with any duties which they may be willing to undertake, or pay them any remuneration which they may demand; and he is bound to exercise his discretion in the matter.

BENJAMIN WEALL, who died in 1868, bequeathed his residuary personal estate, including leaseholds, to *John Weall* the elder, *William Weall* the elder, and *William Lightfoot*, upon trust thereout to raise certain sums, and as to the ultimate residue upon trust to pay the income thereof to *Margaret Andrews* (therein called *Margaret Weall*) during her life and after her death upon the trusts therein mentioned. And the testator devised the residue of his real estate to the same trustees upon trust (subject to certain payments) to pay the residue of the rents and profits to *Margaret Andrews* during her life, and after her decease upon the trusts therein mentioned. *William Weall* the elder died in 1874, and *John Weall* the elder died in 1879; and the Defendants *William Weall* and *John Weall* were appointed trustees in their places. The Defendants *William Weall* and *John Weall* and *William Lightfoot* for several years prior to 1884 employed *Sydney F. Weall* as solicitor to the estate and to collect the rents, allowing him a commission of 5 per cent. on the rents. They also paid, or allowed him to retain out of the rents, certain sums of money for costs, part of which, as *Margaret Andrews* alleged, and as the Court held on the evidence, were unnecessary, and part ought to have been charged to *corpus* and not to income. *William Lightfoot* died in 1886.

Margaret Andrews brought this action against the Defendants *William Weall* and *John Weall* and against the executors of *W. Lightfoot* claiming that the Defendants *William Weall* and *John Weall* and the estate of *William Lightfoot* were jointly and severally liable to make good to her the losses she had incurred as aforesaid; and claiming all necessary accounts as to the estate of the testator and the costs of the action.

The principal defence was that the Plaintiff was aware of and assented to what was done, and that some of the costs were incurred by her desire.

This was the trial of the action.

Warmington, Q.C., and *MacSwinney*, for the Plaintiff.

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MacSwinney, also for the Remaindermen.

Barber, Q.C., and *Bardswell*, for the Defendants.

Witnesses were examined on both sides, and the Court came to the conclusion that the Plaintiff had not assented to what had been done. The Defendants therefore were wrong and the Plaintiff had succeeded. The facts and the results of the evidence are stated in the judgment.

As to the costs of the action,

Warmington, Q.C.:—

The trustees have been wrong throughout and the estate must not be charged with the costs which they have occasioned.

Barber, Q.C., and *Bardswell*:—

Trustees have a right to employ a solicitor, and even if he does more than than he ought to have done they cannot be held liable for paying his bill. The solicitor may have made a mistake, or the trustees may have made a mistake, but that does not make them liable: *Stott* v. *Milne* (1). There has been no breach of trust and no gross misconduct; it is a mere question of account, and chiefly as between income and *corpus*: *Turner* v. *Hancock* (2). At all events they cannot be made to pay any costs.

Warmington, in reply:—

The questions here are not as to the accounts in an administration suit, but are directly raised as to the propriety of these charges. The Defendants have chosen to raise a defence which has failed, and the Plaintiff has been found to be entirely in the right.

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The only point argued on the further consideration of the case and now requiring decision is by whom the costs of the action are to be borne. The short result of the proceedings is that none of the costs which are mentioned in the statement of claim and

(1) 25 Ch. D. 710. (2) 20 Ch. D. 303.

which gave rise to the litigation are payable out of income as distinguished from *corpus*, and that, almost precisely to the extent contended for by the Plaintiff, they are not chargeable against the trust estate at all. Therefore, speaking generally, the Plaintiff has succeeded, and the Defendants, the present trustees and representatives of a deceased trustee, have failed in the action, and the question occurs, why is not the Plaintiff entitled to her costs, and why should the Defendants not be held liable to pay them?

On behalf of the Defendants it was argued by Mr. *Barber* with his accustomed force that they had been proved to be in the wrong only as regards matters of account, and that trustees do not pay costs occasioned by errors in accounts, and, indeed, are allowed them out of the trust estate unless misconduct has been proved; and he relied on the cases of *Turner* v. *Hancock* (1) and *Stott* v. *Milne* (2). Those cases, of course, are binding on me and must be followed; but I venture to add that in my judgment they express in apt language what has ever been the rule of the Court. They express what is termed the contract between trustee and *cestui que trust*, and also that tenderness which the Court is anxious to exhibit towards trustees honestly exercising discretion in discharge of their duties, often difficult and still more often thankless.

This, however, does not dispose of the case before me. There is another and somewhat different question which must all the more be considered because, as pointed out by Mr. *Warmington* in reply, this is not really an action for administration of a trust, but it was commenced and brought to trial for the purpose of challenging the claim of the trustees to charge particular items of expenditure against the trust estate.

Consider for a moment the position of that special agent called a trustee as regards the employment of sub-agents. He certainly has the right to appoint them, if and so far as the work of the trust reasonably requires; for instance, he may appoint a broker to make or realize investments, or a solicitor to do legal business, and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employ-

(1) 20 Ch. D. 303. (2) 25 Ch. D. 710.

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ment is, as pointed out in the well-known case of *Speight* v. *Gaunt* (1), reasonableness, and whether there happens to be a standard to which appeal can be made by taxation or otherwise or not, reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not, however, follow that he can intrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is his conclusion—that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence guided by such rules and arguments as generally guide such a man in his own affairs. If trustees fail to exercise their discretion, or purporting to exercise it do so in such a manner that the Court is bound to infer that they have not done so honestly, their costs of any proceedings challenging their accounts are taken out of the rules laid down in *Turner* v. *Hancock* (2) and *Stott* v. *Milne* (3); and the Court is at liberty, and under certain circumstances may be bound, for the protection of *cestuis que trust*, to disallow the trustees' costs, or even make them pay those of others.

One other general remark before applying these principles to the particular case. Trustees deserve and receive the utmost consideration at the hands of the Court. They gratuitously undertake duties for the benefit of others, and as regards costs and otherwise they are entitled to generous treatment. But *cestuis que trust* also have their rights, their claim to consideration. The trust property is theirs, managed for their benefit, and on the trial of a question between them and their trustees, by whom costs are to be borne, they may fairly require something more to be proved than absence of dishonesty. They must not

(1) 22 Ch. D. 727; 9 App. Cas. 1. (2) 20 Ch. D. 303.
(3) 25 Ch. D. 710.

complain of mistakes or errors in judgment, but reasonable prudence is not too much for them to require, and by reasonable prudence I mean that which is defined in the judgment in the case of *Speight* v. *Gaunt* (1) already mentioned.

I have intended throughout the above remarks to follow the principles of that case and of subsequent cases commenting on it. A decision of the House of Lords requires no sanction, but the language used by other Judges in adopting and expounding that particular decision has assisted to make it a most instructive and useful statement of the extent and limit of trustees' authority and consequent liability. Now, to apply these principles to the case in hand. Of the three trustees of *Benjamin Weall's* will in office during the period of the transactions to which this litigation relates *John Weall* was undoubtedly the foremost. He was the acting trustee, and by him *William Weall*, who, as far as I can see, did nothing, was content to be guided. *William Lightfoot*, the third trustee (now dead), also did little, but he had views of his own, which, according to the correspondence, he asserted with some vigour. They were peculiar views and open to criticism, but he has not had an opportunity of explaining himself, and I therefore refrain from further comment. Suffice it to say that, as regards the particular matter which gave rise to this action, he certainly did not differ from his colleague *John Weall*, in the sense of urging the adoption of a course more agreeable to the Plaintiff's requirements. These trustees had employed as their solicitor for trust purposes Mr. *Sydney F. Weall*, and, besides giving him ordinary legal business, they had allowed him to receive the rents of the trust estate and to retain a commission of 5 per cent. for his trouble. This does not commend itself to me, but the Plaintiff's claim to be reimbursed this commission was abandoned at the trial, and although it was stipulated that the proper influence, whatever that might be, on the subject of costs should not thereby be lost, yet, not having had an opportunity of fully discussing the matter, I prefer to lay it aside. Observe, however, that this receipt of rents has really been the moving cause of the litigation, for it is clear that, if *Sydney F. Weall* had not had the means of paying himself the charges

(1) 22 Ch. D. 727; 9 App. Cas. 1.

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objected to, he would never have been paid at all, and this action would not have been necessary. Mr. *Sydney F. Weall*, without instructions or any sufficient reason, prepared an abstract of the title to the testator's residuary estate, and charged for it nearly £100. To this charge the Plaintiff objected. Having read through the correspondence, the position taken by her is plain, as is also the manner in which she was treated by the trustees. She from first to last objected to the charge on principle, and asserted that it must be wholly disallowed. They, on the other hand, never went further than a suggestion that the bill should be taxed, and though perhaps taxation might have solved the difficulty, it would have been one under special order and not such as was suggested or was likely to be assented to by the solicitor. It is due to the Defendant *John Weall* to say that he knew and admitted that the charge was altogether wrong, and my conclusion from the correspondence, without further explanation, is that with but little encouragement he would have taken a bolder course than, unfortunately for himself and his colleagues, he in fact did. I again call attention to the fact that *Sydney F. Weall's* receipt of rents had enabled him to pay himself, and this placed the trustees in a position of great difficulty.

Failing to obtain redress, the Plaintiff commenced this action, and, passing over the statement of claim (in which the facts are stated plainly and with due moderation), I must say a word on the defence. The trustees had claimed to charge the particular costs already mentioned against the Plaintiff's income to the exoneration of the *corpus* of the trust estate. For this there was no justification, but they pleaded the Plaintiff's wish to that effect, and that she had acquiesced in their dealings with the income. At the trial they were forced to admit this view to be erroneous, and to account to the Plaintiff for income accordingly. They further pleaded that the particular costs had been incurred in compliance with the Plaintiff's express desire, of which they were unable to tender any evidence. And, the Plaintiff alleging that none of the costs were chargeable against income, but that some were chargeable against *corpus*, and the rest not chargeable against the trust estate at all, the trustees justified all the costs, including those admitted by *John Weall* to have been improperly

incurred, as properly chargeable against *corpus*. This question has been investigated in a most complete and satisfactory manner, with the result already noticed. It has been determined that out of £175 4*s.* 8*d.*, the total amount of costs, £84 7*s.* 8*d.*, or less than 50 per cent., is properly chargeable against *corpus*, and that, as regards the sum of £90 17*s.*, there is no charge whatever, or, in other words, that sum has been improperly paid to or allowed to be retained by the solicitor. I am not sure how far the conclusion from this ought to be affected by any offer made on behalf of the Plaintiff, but it is worthy of notice that an offer was made which would have given almost exactly this result without the pain and expense of litigation. Why it was declined I do not understand. It would, I think, be an unwarranted departure from the principles which I have endeavoured to expound not to make the trustees pay the costs which have been occasioned by their disregard of those principles and their unjustifiable defence. To accede to the argument of counsel for the trustees that I ought not in any event to do more than deprive them of their costs would be to cast on the trust estate an undue burden by reason of litigation which is the direct consequence of the trustees' default. It is right to add that, having gone carefully through the pleadings and the other papers to see whether I could relieve them of any part of the costs as being in respect of matters capable of being brought under the general rules in favour of trustees, I regret to say that I can find no reason for distinction. The trustees seem to me to have been wholly wrong, from first to last.

The form of order may require consideration, but, as regards the only point argued, my judgment is that the Defendants, the trustees, and the representatives of the deceased trustee must pay the costs of the action, including the costs of the remaindermen who were added as Defendants in order to try the liability of the *corpus* on which the trustees insisted.

Solicitors for Plaintiff: *Soames, Edwards & Jones.*

Solicitor for Defendants: *E. W. Reeves*, agent for *Sedgwick & Co., Watford.*

C. M.

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July 25, 26.

BLORE *v.* ASHBY.

[1888. B. 476.]

Third Party—Directions—No Pleading—Right to appear—Default—Indemnity—Costs of Defence which failed—Rules of Supreme Court, 1883, *Order* XVI., *r.* 52.

An action was brought for specific performance of a contract. The Defendant pleaded that he was not liable on the ground that he signed the contract as agent for another person.

The Defendant served a third party notice on the other person who appeared and took no further proceedings. The Defendant obtained an order that the question as to the liability of the third party should be tried as soon as might be after the trial of the action:—

Held, that the third party might appear by counsel and have the question tried immediately after the trial of the action, without having obtained directions as to pleading or otherwise; and that if the Defendant wished for such directions he should have taken steps to have them given:—

Held on the evidence, on the question of liability, that as between the Plaintiff and the Defendant the Defendant was liable, but that the Defendant was to be indemnified by the third party, who was to pay the costs of the third party proceedings between him and the Defendant; but that the Defendant having set up a defence which failed must pay the costs of the action.

THIS was an action for specific performance of a contract to purchase two houses. The Defendant *Ashby* pleaded that he was not liable on the ground that he signed the contract as agent for one *Shepperson*. *Ashby* then gave *Shepperson* a third party notice to which *Shepperson* appeared, but took no further proceedings. On the application of *Ashby* it was, on the 6th of March, 1889, ordered that the question whether *Shepperson* was liable to indemnify *Ashby* should be tried as soon as conveniently might be after the trial of the action for specific performance.

The action now came on for trial.

S. Hall, Q.C., and *Warrington*, for the Plaintiff.

J. G. Wood, for *Ashby*.

Swinfen Eady, for *Shepperson*, proposed to cross-examine a witness.

J. G. Wood objected that *Shepperson* could not raise any defence. He had been served with the notice and had not denied his liability to indemnify *Ashby*, and must be taken to be liable.

KEKEWICH, J.:—

This third party practice is new and is not yet settled. It is desirable that one should be quite sure how far one ought to go, and what the position of the parties is. Mr. *Wood* contends that because the third party has not obtained, as if it was right that he should obtain he might have done on the hearing of the Defendant's summons, directions for delivery of pleadings, or discovery, and so on, therefore he is not entitled to try the question between him and the Defendant at all. That is directly contrary to the words of the order of the 6th of March, 1889, which says that "the question whether the said *Frederick Shepperson* is liable to indemnify the Defendant to any and what extent under the notice shall be tried as soon as conveniently may be after the trial of this action or after the Defendant shall have submitted to judgment.'' The order not only contemplated, but stated positively, that there was a question between the Defendant and the third party to be tried, and said as near as might be when it should be tried. So that contention entirely fails. It is impossible to say that there is not a question to be tried. Then it is said that the third party is in default because he did not get directions. To my mind it is the Defendant who is in default. The Defendant made an application, which he was bound to do, under the 52nd rule of Order XVI. I have not the summons before me, but I will assume that he asked for everything to which he could properly be entitled, and he now says that he did not get what was right—that proper directions were not given so as to have pleadings and bring the issue before the Court. If so, the Defendant ought to have appealed, and taken it to another Court and got the proper directions. It is entirely the Defendant's fault if the order is not sufficiently large. To my mind it is sufficiently large. I am directed as soon as conveniently may be after the trial of this action—which I shall certainly hold to be immediately after the trial of this action, unless some reason for delay occurs—to try this question. As

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the Defendant has not thought fit to raise any issue by separate pleadings, I must hear it on the best materials I can, with the assistance of counsel and the oral evidence; and with a view of doing that, I think the better way is that Mr. *Ashby* shall be cross-examined by Mr. *Swinfen Eady* now.

The trial of the action then proceeded, *Ashby* contending that he was known to be merely agent for *Shepperson.* The Court, however, held that as between the Plaintiff and *Ashby, Ashby* was liable on his contract. The question between *Ashby* and *Shepperson* as to *Ashby's* right to indemnity was then tried, and the Court held that *Ashby* was agent for and was entitled to indemnity from *Shepperson.*

As to the costs,

KEKEWICH, J.:—

Mr. *Shepperson* must pay the costs of the third party proceedings. Mr. *Swinfen Eady* cannot suggest any reason why the ordinary rule should not be followed. As regards the costs of the action, I think the case has a strange peculiarity. In an ordinary case of an action by a vendor for specific performance if the purchaser sets up a right to be indemnified by another person either as sub-purchaser, or, as in this case, principal, I think that as a rule that other person, if the case goes against him, ought to pay the whole costs of the action, which presumably has been defended for his benefit. But here the facts shew that the presumption cannot be made. Mr. *Wood* now says that *Ashby* would have accepted *Shepperson's* indemnity at any moment; but I have not seen any evidence of that throughout the case. What he said was: "I am not liable at all; I am not under that legal liability to *Blore* which *Blore* seeks to enforce against me; and I have also an indemnity against *Shepperson;* in point of fact, I have something better than an indemnity, I have the absence of liability to the vendor." And he fought that for his own benefit, and not for the benefit of *Shepperson,* who could not have been benefited by that. On the contrary *Shepperson* would have been made, according to the Defendant's view, the principal in the

contract in the first instance, and liable, according to his view, directly to *Blore* instead of by a circuitous process. I think that Mr. *Ashby* defended this action for his own benefit, and whatever benefit he has derived from it he must pay for by bearing his own costs; that is to say, he has got an order against him in the action, and he will have no right of indemnity as regards these costs against Mr. *Shepperson*.

Solicitors for Plaintiff: *Marsland & Co.*, agents for *W. B. Smith, Nottingham.*

Solicitors for Defendant: *Harvey & Capron*, agents for *H. H. Carter, Nottingham.*

Solicitors for *Shepperson*: *Aldridge, Thorn & Morris*, agents for *Acton & Marriott, Nottingham.*

C. M.

REINHARDT *v.* MENTASTI.

KEKEWICH, J.
1889
July 22, 23, 24; *Aug* 2

[1888 R. 1550.]

Injunction—Injury—Adjoining Houses—Cellar—Stove—Reasonable Use.

The Defendants, keeping a hotel in *London*, had put up a stove, the heat of which rendered the cellar of the adjoining house unfit for storing wine:—

Held, that though the Defendants were acting reasonably in the use of their house, yet as they caused serious annoyance and injury to the Plaintiff, the Court would interfere and protect the Plaintiff; the jurisdiction of the Court not depending on the question of reasonable use.

Bamford v. *Turnley* (1) and *Gaunt* v. *Fynney* (2) discussed.

Broder v. *Saillard* (3) followed.

C. W. REINHARDT, the Plaintiff in this case, was a banker and money-changer, carrying on his business at and occupying No. 14, *Coventry Street, Piccadilly*. At the back of his house was a small wine cellar separated from the back of a hotel kept by the Defendants by a party wall only. The Defendants, *Mentasti Brothers*, had a large hotel in *Arundell Street*, called *Previtali's Hotel*, and they had recently put up in their kitchen a stove so near to the wine cellar of the Plaintiff, that as he alleged and as

(1) 3 B. & S. 62. (2) Law Rep. 8 Ch. 8.
(3) 2 Ch. D. 692.

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appeared to be the fact, the wine cellar became so hot as to be unfit for the storage of wine. This action was brought, claiming an injunction and damages.

Neville, Q.C., and *Wurtzburg*, for the Plaintiff.

Warmington, Q.C., and *Farwell*, for the Defendants.

The result of the evidence and the arguments used are fully stated in the judgment of the Court.

Aug. 2. KEKEWICH, J.:—

For obvious reasons the result of this case may affect many localities and many persons. I therefore thought fit to reserve my judgment, and, although the conclusion which I am about to express is the same as that which I entertained at the close of the trial, I confess to some fluctuation of opinion since that time, as well as during the argument. I thought it possible, and indeed probable, that by studying some of the cases on this branch of law I should find a line of demarcation between those nuisances which may be said to partake of the character of trespass and those of which this cannot be averred, and a disposition on the part of the Court to grant injunctions more readily against the former than the latter. My examination of the authorities has not justified this anticipation. There are, no doubt, expressions in some judgments which point to stronger protection being given where rights of property are invaded than where they are not; but, on the other hand, there are many cases in which a private nuisance, not affecting rights of property, except so far as to prevent a man from personally using his own with reasonable comfort, may be regarded as having been equally condemned. The principle applied in either class of cases is that a man must not use his own so as to injure his neighbour, and, in substance, the only question discussed in any given case is, whether that principle is applicable to the particular circumstances there occurring. Here there is really no dispute about the material facts. The Defendants in adding to their hotel have recently converted what, it seems, was formerly an unused chamber into a supplemental

kitchen, and have there placed a stove which is used for supplying hot water and cooking pastry. Not only is the stove one of an ordinary character and well constructed, but the Defendants have taken divers precautions to prevent its being obnoxious, and the only thing to be said against them in this respect is that the stove does not occupy the site of the fireplace, which must be taken to have existed since the house was first built, and that thus far they have departed from the original plan of the building. And this use of their own house, alleged to be in all respects—and, subject to the one remark just made—apparently in all respects reasonable, has nevertheless proved exceedingly inconvenient to their neighbour, the Plaintiff, whose cellar was situate right against the stove on the other side of the wall. It was reasonable for the Plaintiff to have a cellar, and it cannot be said that it was otherwise than of a reasonable character or in an inconvenient place. The heat occasioned by the stove passing through the wall has injured the cellar. It has so injured the cellar that, according to the evidence, the Plaintiff is unable any longer to store his wine there, and although he might keep there what is required for daily use, one ordinary and reasonable purpose of a cellar in a private dwelling-house has gone. The Plaintiff says that such interference with his reasonable use of his own property ought not to be allowed, and in answer it is said that the Defendants, who on their part have only used their own property reasonably, are not to blame. The question which I have to decide is, which of them is right. The injury to the Plaintiff being clear and clearly arising from the stove, it lay on the Defendants to establish that they were not culpable. In support of this position reference was made to several judgments, and more particularly to those of Lord *Bramwell* in *Bamford* v. *Turnley* (1), and Lord *Selborne* in *Gaunt* v. *Fynney* (2), which, with many others to be found in the books, contain passages insisting on the right of every man to act reasonably in the enjoyment and use of his own property, and the regard which must be had in every case to the special circumstances attending it, including the distinction between dwellings in crowded cities and those in the open country, and the unwillingness of the Court to interfere at the instance of a plaintiff,

(1) 3 B. & S. 62. (2) Law Rep. 8 Ch. 8.

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who, from ill-health or other cause engendering fastidiousness, complains of that to which his neighbours, however reluctantly, find themselves compelled to submit. Such passages must of course be read in connection with the circumstances of the particular case under consideration, and, what is even more important, they must be read as not intentionally departing from, or rather, in absence of the proof to the contrary, as intentionally adhering to those principles and rules of law which a Judge must be credited with bearing in mind, although he does not think it worth while to repeat or even expressly to refer to them. Thus read, the judgment of Lord *Bramwell*, who concurred with the majority of the Court in reversing the decision of the Court of Queen's Bench, and also in overruling *Hole* v. *Barlow* (1), loses much of the weight which, in reliance on certain selected passages, was sought to be attributed to it by the Defendants, and it is to be observed that in a recent case in the House of Lords, *Fleming* v. *Hislop* (2), the present Lord Chancellor epitomized Lord *Bramwell's* judgment with approval, as saying, "that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction." What fell from Lord *Selborne* in *Gaunt* v. *Fynney* (3) may be explained in like manner, and must rather be understood as illustrating the convenience of what Lord *Bramwell* calls "the rule of give and take; live and let live," than as having established—which I am sure he did not intend to do—any new guide to the decision of cases where a legal nuisance has been proved to exist. I may pass by without further remark the cases of *Ball* v. *Ray* (4), *Sturges* v. *Bridgman* (5), and *Attorney-General* v. *Sheffield Gas Consumers' Company* (6), the judgments in all of which, and especially those in the last case, are instructive on this branch of law and on the points which were argued before me. But it is right to say a word on *Broder* v. *Saillard* (7), because that was eminently a case in which the defendant had behaved reasonably, and yet was enjoined from continuing a nuisance by a Judge who thought the injunction such a

(1) 4 C. B. (N.S.) 334.
(2) 11 App. Cas. 686.
(3) Law Rep. 8 Ch. 8.
(4) Law Rep. 8 Ch. 467.
(5) 11 Ch. D. 852.
(6) 3 D. M. & G. 304.
(7) 2 Ch. D. 692.

hardship that he allowed that consideration to influence the costs. After an argument, in which both *Ball* v. *Ray* (1) and *Gaunt* v. *Fynney* (2) were cited, Sir *George Jessel* states the general law in terms equivalent to those used by Lord Justice *Knight Bruce* in *Walter* v. *Selfe* (3), which has long been treated as giving the true rule of distinction between those nuisances of a personal character which do and those which do not merit an injunction. On page 701 he says: "I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it." He proceeds to explain why it is no answer to say that the defendant is only making a reasonable use of his property, stating that that cannot be the test, and lower down, on page 702, he says what the test, as applied to the case which he had under consideration, is, namely, "Whether the stables are unluckily so situated as that the noise from the horses, not being uncommon horses in any way, materially disturbs the comfort of the plaintiffs' dwelling-house, and prevents the people sleeping at night." If for "horses" you read "stove" and for "sleep" "use of cellar," which, though of course less necessary, and in that sense less entitled to protection, is yet, in my judgment, a reasonable requirement on the part of the Plaintiff, you have a test exactly applicable to the case in hand. Agreeable to this is the opinion of Lord *Blackburn*, worthy of selection from numerous authorities, as expressed in *Scott* v. *Firth* (4). That was a case of nuisance by vibration, caused by steel hammers used in the defendant's workshops, which, besides interfering with the comfort of the plaintiff, had, it was alleged, cracked the walls of the adjoining cottages. The learned judge, in summing-up the case to the jury, stated the question to be whether it was one of nuisance—that is, of actionable wrong; and, after calling attention to the evidence of injury, added this: "A further point has been raised by the plea that the grievances complained of were caused by the defendant in the reasonable and proper exercise

(1) Law Rep. 8 Ch. 467.
(2) Ibid. 8 Ch. 8.
(3) 4 De G. & Sm. 315.
(4) 4 F. & F. 349, 351.

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of his trade in a reasonable and proper place. My opinion is that in law that is no answer to the action. I think that that cannot be a reasonable and proper exercise of a trade which has caused such injury to the plaintiff as she complains of." It seems to me, therefore, that, notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the Court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question is, does he injure his neighbour? I recognise some hardship in an injunction to restrain the Defendants from doing that which I am obliged to regard as a reasonable use of their property—the better adapting to the purposes of an hotel a house situate in a neighbourhood where hotels are conveniently built; but the hardship is not so great as that in *Broder* v. *Saillard* (1), nor do the facts allow me to regard the Defendants as so entirely passive as the Master of the Rolls considered the defendant to be there. Therefore, while granting the relief asked by the Plaintiff, I am bound to do so with the usual consequences. I may, however, properly give the Defendants some time to consider and do what is best under the circumstances, and I shall therefore make the injunction not enforceable for three months.

His Lordship gave the Plaintiff the costs of the action, but ordered him to pay the Defendants the costs of certain minor issues on which he had failed.

Solicitor for Plaintiff: *F. Hatton.*
Solicitors for Defendants: *Fladgates.*

(1) 2 Ch. D. 692.

C. M.

In re HARRISON, McGREGOR & CO.'S TRADE-MARKS.

KEKEWICH J.
1889
Aug. 3.

Rectification of Register—Old Trade-mark or Design—Patents, Designs, and Trade Marks Act, 1883, s. 90.

A word which has been registered under the *Trade Marks Acts*, as an old trade-mark, and which has remained on the register for five years unchallenged, will nevertheless be expunged if it be proved to have been used prior to its registration not as a trade-mark but to specify a particular pattern or design.

MESSRS. *HARRISON, McGREGOR & CO.* were manufacturers of agricultural implements, and carried on business at the *Albion Iron Works, Leigh,* near *Lancaster*, and since the year 1873 had been in the habit of making use of the word "*Albion*" in connection with the agricultural machines and implements which they made and sold.

Messrs. *Woodroffe & Co.* carried on a similar business at the *Albion Iron Works, Rugeley,* in *Staffordshire,* and their predecessors in business there had carried on the same business for very many years under the style of the "*Albion Iron Works Company*" or the "*Albion Foundry.*"

On the 24th of January, 1884, Messrs. *Harrison, McGregor & Co.* registered the word "*Albion*" as their old trade-mark for the articles classified in classes 6 and 7 in the 3rd schedule to the *Trade Marks Rules*, 1883, stating in their application that the mark had been used by them for about one year and six months before the 13th of August, 1875.

Class 6 comprises "Machinery of all kinds, and parts of machinery, except agricultural and horticultural machines included in class 7." Class 7 comprises "Agricultural and horticultural machinery, and parts of such machinery."

On the 28th of May, 1889, Messrs. *Harrison, McGregor & Co.* commenced an action (1889 H. 1518) in the *Manchester* District Registry against Messrs. *Woodroffe & Co.* and others to restrain the Defendants from wrongfully using the Plaintiffs' trade-mark for articles in classes 6 and 7, and from wrongfully representing or passing off machines or articles made or sold by the Defendants

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as machines or articles made by the Plaintiffs, and served with the writ a notice of motion for an interim injunction. Thereupon Messrs. *Woodroffe & Co.* served Messrs. *Harrison, McGregor & Co.* with a notice of motion under sect. 90 of the *Trade Marks Act*, 1883, to rectify the register of trade-marks by expunging the registration made on the 24th of January, 1884, of the trade-mark "*Albion*" for articles in classes 6 and 7, or by limiting the registration to mowers, reapers, chaff cutters, turnip cutters and pulpers only, and not allowing it to remain for class 6 or for all the goods in class 7.

The two motions now came on for hearing together. The Plaintiffs' motion was dismissed with costs, and does not call for a report. The evidence on the Defendants' motion is sufficiently noticed in the arguments and judgment.

Warmington, Q.C., and *R. Griffin*, for the Defendants, *Woodroffe & Co.*, on their motion :—

The grounds of our application are that the Plaintiffs have used the word "*Albion*" not to designate a particular class of goods, but generally to specify the particular pattern or design on which their goods are constructed. Therefore, the registration of the word as a trade-mark is improper. Also, as a matter of fact, they have only used the word in connection with the articles mentioned in our notice of motion, and, therefore, if the registration stands, it must be limited to those articles: *Jelley, Son & Jones' Application* (1).

Moulton, Q.C., and *Hopkinson*, for the Plaintiffs, *Harrison, McGregor & Co.*:—

Our registration has remained unchallenged for five years, and the onus is on Messrs. *Woodroffe & Co.* to shew that we are not entitled, and they have not discharged that onus. There is no authority for saying that a trade-mark must be placed on the articles if it is used and described in the circulars and pamphlets which are issued to the public. But, in fact, some of our catalogues in evidence shew the word "*Albion*" stamped on some of the machines pictured in them. We admit that our registration

(1) 51 L. J. (Ch.) 639.

goes too far, and that we have used the mark only in respect of the goods mentioned in the notice of motion, and are quite willing that our registration shall be limited to those goods.

Warmington, in reply.

KEKEWICH, J.:—

This is a novel question. I am not aware of any case in which it has been attempted to remove from the register a mark placed upon it, apart from the fact that it has been there for five years, and was in use prior to 1875, on the ground that it has been used as a design, and not as a trade-mark. It is quite clear that the two things are entirely distinct. There is statutory provision for the registration of designs, and statutory provision for the registration of trade-marks, and, before any *Trade Marks Act*, there was protection afforded by the Court to trade-marks on the ordinary ground of fraud. Designs, of course, stood on an entirely different footing: but it is quite possible for a man to say "such and such is my design," and then to register that design. It is also possible for him to say, "such and such is my trade-mark," and, if it comes within the proper definition of a trade-mark, to register that. And it is quite possible for him to find some word which is equally capable of indicating a design or a trade-mark. I think Mr. *McGregor* has been successful in this instance in finding such a word, that is to say, this word "*Albion*" is capable of indicating an "*Albion*" design or an "*Albion*" trade-mark. It is a fancy word and he says adopted by him, not to indicate a particular class of machine, or character, or description, or construction, but a machine manufactured by himself. That is just the difference between a trade-mark and a design. Now he obtained registration for a trade-mark used before 1875. I have no doubt on the evidence that the word "*Albion*" was used before 1875; and it was used in connection with some, though I am not prepared to say how many or what, agricultural machines, but whether it was used as a trade-mark or as a design is a more difficult question. I think, however, I must take it on the evidence that the word "*Albion*" was stamped upon some machines, probably not on many, but still upon some

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machines, before 1875, and that so far there is evidence of the use of the word "*Albion*" as a mark of trade or a trade-mark. But I have had put in evidence several catalogues of *Harrison, McGregor & Co.*, for the years before 1875, and one of 1875. I think the fairest way to Mr. *McGregor* is to take the catalogue of 1875, because that was, as near as I can get it, immediately before the date to which he has limited the user, that is one year and six months before the 13th of August, 1875, during which time he had used this mark. Here the word "*Albion*" is used largely for everything that Mr. *McGregor*, or *Harrison, McGregor & Co.*, manufactured. I have it used for mowing and reaping machines, and chaff cutters, prize oil cake breakers, turnip cutters, and pulpers. As regards all those, more or less, if the term "*Albion*" was not used directly by calling them "*Albion*," I think it must be understood that he meant it to be used in that way. I do not see "*Albion*" as regards some of them, but it is certainly used as regards the greater part: certainly as regards chaff cutters, and on one page it is used expressly with reference to pulpers. Now taking that as the best evidence of the use by him on his machines, we see how he used it himself; and it seems to me to be as clear as anything can be, that what Mr. *McGregor* said to the probable purchaser was not "look at the word '*Albion*' and you will get my manufacture," but "look for the word '*Albion*' for the particular kind of machine." That is what he said. "I have got the *New Albion Pattern Double Action Turnip Cutter*: that is, the machine for you to cut turnips with: one of that particular construction: that particular size, and so forth, but not one that is necessarily of my manufacture in the sense of depending on the care which I take in the putting together of the parts and the selection of the materials and so on," which is generally what a manufacturer relies on simply as a trade-mark. He has referred in his affidavit to his advertisements, and I have read some of them which he appends to this catalogue. There are a good many of them, and I do not profess to have read them all. Some of them are opinions of the press, and others are testimonials—letters received from customers—but I have not hit upon one yet which in the slightest degree indicates that "*Albion*" was a trade-mark. On the other hand, I have met

with many which say that it is a particular class of goods of a particular character. I take haphazard one from the *Western Morning News* of the 31st of May, 1875, on page 27, "Messrs. *Harrison, McGregor & Co., Leigh, Lancashire,* have the largest display they have ever contributed"—this is the *Bath and West of England Agricultural Show*—"There is a very large array of their notable '*Albion*' mowers and reapers, not only effective, but easy of handling by ordinary farm labourers. The firm also shew a large assortment of chaff and turnip cutters, pulpers, &c. The chaff cutters are specially adapted for both the English and continental markets, cutting three different lengths, having a stop and reverse motion, and having all the gearing under a neat cover so that there is absolutely no danger of accident." What has that to do with trade-mark? That is the particular construction, which was, I daresay, of the very best. Taking again a testimonial quite haphazard, though I have seen a great many of the same kind, on page 28 Mr. *Robert Shuttleworth, Prestwich Old Hall,* near *Manchester,* says: "I have used your '*Albion*' mower and reaper the last season. It is decidedly the best machine I ever had, and so easy and simple in its construction, and no trouble to keep in order: in fact, my man has mown over sixty acres last year without one breakdown. I can with confidence recommend it to any party wanting one." It is not "I recommend all my friends to see that '*Albion*' is stamped so that they may know that they get those excellent materials which come from your care in construction and manufacture," but "that they may get the machine which you make of a particular construction, so easy and so simple that it is no trouble to keep it in order." That is design, and not trade-mark. The others are of similar character, and it seems to me that what Mr. *McGregor* used before 1875 was what he relied upon as his design, and I think I must take it that though he did—I do not doubt his word—stamp "*Albion*" on some of these instruments (I do not know which, except the chaff cutter), he must have stamped it as indicating the design or the particular construction, and not as being his trade-mark. That is borne out by reference to the few cases in which I have the word "*Albion*" stamped in the engravings, where there is nothing to shew that

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it is disconnected with the particular construction. I see in one particular place, on page 14 of the same catalogue, "'*Albion*' combined mower and reaper," which is the particular article which he was constructing, and which he was recommending to his customers. If I did not come to that conclusion I should be forced to the conclusion that he was only properly registered for certain articles on his own evidence. He could not possibly, because he used "*Albion*" for mowers, reapers, chaff cutters, and other things, register it for all agricultural and horticultural implements, and all other machinery, which is what he has done. It was never intended that a man having a trade-mark for one class of machinery should register it as a trade-mark for all: but I need not go further into that, because I think that if he had only used the word "*Albion*" as designating a particular construction or class of machine he did not use it as a trade-mark before 1875. Therefore he ought not to have been placed on the register as the owner of a trade-mark, and therefore the register being in that sense improper must be rectified, with costs.

Solicitor for Messrs. *Woodroffe & Co.: C. G. Woodroffe.*

Solicitors for *Harrison, McGregor & Co.: Shaw, Tremellen, & Kirkman.*

H. L. F.

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ADMINISTRATION—*continued.*
years twenty-six years had expired. Both these theatres were underlet at largely improved rents, and they respectively produced net profit incomes of £2109 and £186. Each of the leasehold theatres, and one of the freehold theatres, was subject to a mortgage, the mortgage debts together amounting to £12,500. The testator's debts (other than the mortgage debts on the theatres) and his funeral and testamentary expenses and pecuniary legacies had been all paid out of his personal estate, and there remained a balance of £2000 in the hands of the surviving executor. The annuities had been punctually paid since the testator's death. The annuitants claimed to be entitled to have the leasehold theatres sold, and the mortgage debts paid out of the proceeds of sale, and that a sufficient sum should then be invested, in the mode in which cash under the control of the Court would be invested, to provide for the payment of the annuities. The residuary legatees proposed that the executors should raise by mortgage of one of the leasehold theatres such a sum as (with the £2000 in the executors' hands) would be sufficient to discharge the testator's mortgage debts, and that the annuities should be secured by a first mortgage on the two freehold theatres, the charge of the annuities on the residue of the testator's estate (subject to the new mortgage to be created) remaining undisturbed, with liberty to the annuitants to apply to the Court for additional or other security, in case the annuities, or any of them, should fall into arrear; and that, after payment of the interest on the new mortgage and the annuities, the residue of the income of the estate should be divided between the residuary legatees:—*Held*, on the authority of *Re Potter* (50 L. T. (N.S.) 8), *Webber* v. *Webber* (1 S. & S. 311), and *King* v. *Malcott* (9 Hare, 692), that the annuitants were not entitled to have the leasehold theatres sold, but that, the estate having been cleared by the payment of the testator's debts, and funeral and testamentary expenses, the annuitants were only entitled to have the annuities sufficiently secured, and that the proposed security would be sufficient. *In re* PARRY. SCOTT *v.* LEAK - - - - 570

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—— *Goold* v. *Teague* (7 W. R. 84; 5 Jur. (N.S.) 116) doubted - - - 550
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—— *Humble* v. *Shore* (7 Hare, 247; 1 H. & M. 550, n.), considered - - - 62
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—— *Lloyd* v. *Chune* (2 Giff. 441) criticised 119
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—— *Mason* v. *Westoby* (32 Ch. D. 206) considered - - - - 590
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—— *Millington* v. *Fox* (3 My. & Cr. 338) distinguished - - - - 390
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—— *Mills, In re* (34 Ch. D. 186) approved 93
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—— *Nottingham (Guardians of)* v. *Tomkinson* (4 C. P. D. 343) followed - - 282
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—— *Peek* v. *Derry* (37 Ch. D. 541; 14 App. Cas. 337) followed - - - 436
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—— *Potter, Re* (50 L. T. (N.S.) 8) followed 570
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—— *Price* v. *Jenkins* (5 Ch. D. 619) followed 79
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—— *Quebrada Railway Land and Copper Company, In re* (40 Ch. D. 363) not followed
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—— *Quincey* v. *Sharpe* (1 Ex. D. 72) followed
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—— *Richards, In re* (36 Ch. D. 541) criticised
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—— *Shropshire Union Railways and Canal Company* v. *Reg.* (Law Rep. 7 H. L. 496) discussed - - - - 263
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—— *Skeet* v. *Lindsay* (2 Ex. D. 314) followed
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—— *Thomas* v. *Sylvester* (Law Rep. 8 Q. B. 368) explained and followed - - 343
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—— *Turner* v. *Buck* (Law Rep. 18 Eq. 301) considered - - - - 517
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—— *Walker, In re* (W. N. 1885, p. 196) followed
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—— *Warrington* v. *Warrington* (2 Hare, 54) followed - - - - 306
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—— *Webber* v. *Webber* (1 S. & S. 311) followed
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—— *Williams* v. *Peel River Land and Mineral Company* (55 L. T. (N.S.) 689) followed
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CHAMBERS—Order in—Motion to discharge—Time - - - - 505
See PRACTICE. 1.

CHARITY—*Deed void altogether—Legal Estate—Charitable Trust—Title by Possession—One of several Trustees barred.*] Real estate was by deed expressed, to be conveyed to trustees upon charitable trusts. The deed was not enrolled, and the grantor died within a year after the execution of the deed. On his death the trustees named in the deed entered into possession, and applied the rents and profits according to the trusts of the deed:—*Held*, that the deed was not voidable only, but was absolutely void under 9 Geo. 2, c. 36, s. 3, and was not valid as conveying the legal estate, and void only as creating charitable trusts:—*Held*, that the trustees of the deed, having been in possession more than twelve years prior to the commencement of an action against them by persons claiming under the grantor, the action was barred by the Statute of Limitations.—One of the trustees was the general devisee and legatee of the grantor:—*Held*, that the trustees could not be held mere licensees of the devisee and legatee; and that the accident of his being one of the trustees did not operate to defeat their title. CHURCHER *v.* MARTIN - 312

2. —— *Will—Construction—Gift to Charity—Persons not under Fifty Years of Age—"Aged" Persons within 43 Eliz. c. 4—"Deserving."*] A testator directed that the interest of a fund should be for ever divided into annuities of £10 each, and be paid half-yearly "to an equal number of men and women not under fifty years of age, Unitarians, who attend L. M Unitarian chapel or chapels in B.; a tablet to be placed in L. M. chapel to give the information of gift, otherwise how should the deserving know of it":—*Held*, a good charitable gift for the benefit of "aged" persons, within 43 Eliz. c. 4. *In re* WALL. POMEROY *v.* WILLWAY [510

COLLEGE - - - - - - 624
See UNIVERSITY.

COMPANY—*Dividends—Profits earned applied to extension of Works—Bonds bearing Interest given in payment of Dividend—Construction of Articles of Association—Ultra vires.*] A waterworks company constituted under the Companies Act, 1862, having applied the profits which had been earned to the construction of productive works instead of paying a dividend to the shareholders, passed a resolution proposing to give to the shareholders debenture bonds bearing interest, and redeemable at par, by an annual drawing, extending over thirty years. The articles of association empowered the directors, with the sanction of the company, to declare a dividend "to be paid" to the shareholders:—*Held*, that what was proposed to be done by passing of the resolution was, upon the true construction of the articles, not in accordance with them, and that there must be an injunction to restrain the directors from acting on the resolution. WOOD *v.* ODESSA WATERWORKS COMPANY - - - - - - 636

2. —— *Fraudulent Prospectus—Action of Deceit.*] R., the principal partner in a trading firm, concurred in steps for turning the partnership into a company with limited liability. His name appeared in the prospectus as managing director of the new company with a note that he would not join the board till after the transfer of the business to the company had been completed. He did not issue the prospectus but furnished materials for it, saw it in draft though not in its final shape, and made alterations in it. The prospectus contained a statement that the business had paid 17 per cent. upon the capital employed in it. This statement it appeared might be true if "capital employed" did not include the business premises, or only included their value subject to mortgages upon them, but was grossly untrue if the whole value of the business premises was taken

COMPANY—*continued.*

as part of the capital. A person who took shares on the faith of the prospectus sued R. for damages for misrepresentation:—*Held*, by Kekewich, J., that R. was under the circumstances liable to the same extent as if he had been the person issuing the prospectus:—*Held*, also, by Kekewich, J., that the statement as to 17 per cent. was untrue and made recklessly without any reasonable ground for believing it to be true, and that R. was liable to damages for misrepresentation, following *Peek* v. *Derry* (37 Ch. D. 541). After this the decision in *Peek* v. *Derry* was reversed by the House of Lords:—*Held*, on appeal, that, according to the law as laid down by the House of Lords in *Peek* v. *Derry* (14 App. Cas. 337), in order to make a person liable for damages for misrepresentation it is not enough that the statement should be untrue and made without any reasonable ground for believing it to be true, but it must be made dishonestly; that the onus of proving dishonesty lies on the plaintiff; that if the party making the statement believed, however unreasonably, that it was true, he is not liable; that the plaintiff in the present case had not shewn that the statement was made dishonestly, and that the judgment must be reversed and the action dismissed. GLASIER *v.* ROLLS - - C. A. 436

3. —— *Shares—Invalid Allotment of Shares—Irregular Appointment of Quorum of Directors—Attempted Ratification after Repudiation by Allottee—Qualification of Directors—Companies Act*, 1862, *s.* 35.] The articles of association of a company excluded Table A to the Companies Act, 1862. They provided that the shares should be allotted by the directors; that the qualification of a director should be the holding of at least forty shares; that the directors should not be more than ten nor less than three in number; that the first directors should be appointed by the majority of the subscribers to the memorandum of association; and that the directors might determine the quorum necessary for the transaction of business. On the 22nd of October the seven subscribers to the memorandum met and unanimously appointed four persons directors. On the 24th of October S applied for 100 shares. On the same day the first meeting of directors was held, at which two only of the four directors were present. No sufficient notice of this meeting had been given to all the directors. They resolved that two directors should form a quorum, and then proceeded to allot shares, including 100 to S. They adjourned the meeting till the next day. S. received notice of allotment on the 24th. At this time none of the directors had any shares, but at the adjourned meeting on the following day forty shares were allotted to each of them. On the 25th S. gave notice to the company that he withdrew his application. On the 25th the meeting was further adjourned to the 26th. On the 26th three directors were present, and one of them, who had been absent on the 24th, expressed in writing his approval of the resolution as to a quorum. At this meeting the former allotments were confirmed. The other absent director on the same day wrote an approval of the resolution as to a quorum, and it was received by the company on the 27th. On application by S. to have his name removed from the register:—*Held*, by North, J., that the two directors had no power to appoint themselves a quorum, and that, consequently, the allotment of shares to S. was invalid, and that it could not be ratified after S. had withdrawn his application for shares, but that the allotment, if it had been made by all the four directors, would not have been invalid merely because they had not previously acquired any qualification by the holding of shares.—*Held*, by the Court of Appeal, that assuming every other point to be decided in favour of the company, the allotment was invalid on the ground that notice of the meeting of the 24th had not been given to all the directors, that this meeting was therefore irregular, and the adjourned meeting of the 26th was therefore equally irregular. *In re* PORTUGESE CONSOLIDATED COPPER MINES, LIMITED - - - C. A. 160

4. —— *Shares—Issue at a Discount—Ultra vires—Dealing with Shares by Holder—Acquiescence—Repudiation—Rectification of Register—Mistake of Law—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 23, 35—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] A company, empowered by its articles of association to issue new shares at a discount, in December, 1886, offered to allot to Mrs. S., a shareholder, any portion of a new issue of 5000 £5 shares at the price of 10*s.* per share. Mrs. S. applied for 673 of these shares. They were allotted to her by the company in January, 1887. She paid the 10*s.* per share, was registered as the owner of 673 fully paid-up shares of £5 each, and on the 25th of March she received a certificate for them accordingly. At the time of the issue of the new shares and down to December, 1887, it was believed that the issue of these new shares at a discount of £4 10*s.* per share was not ultrà vires on the part of the company.—On the 30th of March, 1887, Mrs. S. sold 150 of these shares as fully paid up to a purchaser for value without notice that they had been issued at a discount. On the occasion of this sale she surrendered the certificate for the 673 shares, and received back a fresh certificate for the remaining 523 shares.—In April and August, 1887, she attempted to alienate some of the 523 shares. In December, 1887, the validity of the issue of shares at a discount was doubted by the Court of Appeal in the case of *In re Addlestone Linoleum Company* (37 Ch. D. 191). In January, 1888, Mrs. S. applied for, as a shareholder, and sent in to the company, proxies in respect of the 523 shares. On the 2nd of February, 1888, Mrs. S. wrote to the company that she had been advised that the issue of new shares at a discount was illegal, and that if the directors attempted to make a then proposed further issue of new shares at a discount she would apply to restrain them. In June, 1888, Mrs. S. required the company to return the amount she had paid for the 673 shares, and to remove her name from the list of shareholders in respect of them.—In September, 1888, she took back from the purchaser the 150 shares she had sold, in exchange for 150 fully paid-up shares. In November, 1888, she applied to the Court to strike out her name from the list of shareholders in respect of the 673 shares:—*Held*, by Stirling, J., that the contract

COMPANY—*continued.*

to take the 673 shares at a discount was void, and that Mrs. S. was entitled to relief except as to the 150 shares taken back, which having been repurchased from a purchaser for value without notice, must be treated as fully paid-up shares.—On appeal by the company as to the 523 remaining shares:—*Held*, by the Court, in allowing the appeal, that although the contract under which she took the shares could not have been enforced against her, the Respondent having, with knowledge that her name was on the register as the holder of the shares, dealt with them as if she had been a member of the company in respect of them, had assented to keep them, and was liable under the 25th section of the Companies Act of 1867 to pay the whole amount of them in cash, notwithstanding her misapprehension of the legal effect of the contract she had originally entered into.—*Arnot's Case* (36 Ch. D. 702) distinguished. *In re* RAILWAY TIME TABLES PUBLISHING COMPANY. *Ex parte* SANDYS - - - C. A. 98

5. —— *Shares—Issue at a Discount—Winding-up — Contributory — Application — "Underwriting" Contract — "Underwriting at a Discount."*] After the formation of a company, and before its shares had been fully offered to the public, H. & Co. by letter agreed with an agent of the company to "underwrite" 10,000 shares "at 15 per cent. discount," and "to pay the application money upon any balance of shares required to make up the 10,000." In pursuance of this agreement, and without any further application by H. & Co., 8555 shares were allotted to them. H. & Co. returned the allotment notice, and wrote declining to take the shares.—The company shortly afterwards went into liquidation, and the liquidator entered the name of H. & Co. upon the list of contributories in respect of these shares:—*Held*, by the Court of Appeal, after hearing expert evidence as to the meaning of the term "underwriting" as applied to shares to be issued by a company, first, that the agreement to underwrite must be treated not merely as a guarantee, but as an application for an allotment of so many of the 10,000 shares as should not be applied for by the public, and that such agreement authorized the secretary to issue an allotment to H. & Co.; and *held*, secondly, that the word "discount" in the agreement must be construed as "commission," so that the agreement was not one to issue shares at a discount; and *held*, accordingly, that H. & Co. had been rightly settled upon the list of contributories.—The judgment of Chitty, J., affirmed. *In re* LICENSED VICTUALLERS' MUTUAL TRADING ASSOCIATION. *Ex parte* AUDAIN C. A. 1

6. —— *Shares—Reduction of Capital — Reducing Part only—Ultrà vires—Companies Act, 1867 and 1877.*] A limited company desiring to effect a reduction of capital under the Companies Act, 1867 and 1877, has no power to do so by reducing some of its shares but not reducing others. Accordingly a petition for the sanction of the Court to a special resolution passed by a company for reduction of capital by reducing the amount of its ordinary shares while not reducing the amount of certain shares carrying a preferential dividend, was dismissed.—*In re Barrow Hæmatite Steel Company* (39 Ch. D. 582), and *In re Quebrada Railway, Land and Copper Company* (40 Ch. D. 363), not followed. *In re* UNION PLATE GLASS COMPANY - - - - - 513

7. —— *Shares — Transfer — Registration — Powers of Directors—Fiduciary Relation—Discretion to refuse Registration—Rectification of Register—Indebtedness of Transferor, when to be ascertained — Call — Resolution — Date of Call omitted—Date fixed by subsequent Resolution—Relation back—Minutes, Alteration of—Agenda Paper—Order of Business—Companies Act, 1862, ss. 22, 35.*] Under sect. 22 of the Companies Act, 1862, the right to transfer his shares is incident to every shareholder; and, therefore, a director-shareholder has as much right as any ordinary shareholder to transfer his shares and to have his transfer registered, unless he falls within a provision in the company's articles of association enabling the directors to refuse registration where the shareholder seeking to transfer is "indebted to the company in respect of calls or otherwise;" and the Court will, on an application by the director-shareholder under sect. 35 of the Companies Act, 1862, exercise its power of compelling registration provided there is no equity against him as director, such as having been party to a postponement of a call to enable him to get rid of his shares and so evade liability.—Where the articles of association of a limited company give the directors a discretion to refuse to register a transfer of shares by a shareholder if he is indebted to the company, the time at which it is to ascertained whether he is indebted or not is when the transfer is sent to the proper officer of the company for registration, and not when it subsequently comes before a board-meeting for registration. Thus, where H., a shareholder, who was also a director, executed a transfer of his shares for value, and thereupon the transferee sent it in to the secretary of the company for registration as required by the articles of association, and shortly afterwards the transfer was submitted by the secretary to the directors at a board-meeting for registration, but the board declined to register it, and passed a resolution for a call:—*Held*, on an application by H. against the company, under sect. 35 of the Companies Act, 1862, to compel the registration, that under the company's articles of association the directors had a discretion to refuse registration only where the shareholder seeking to transfer was "indebted to the company in respect of calls or otherwise;" and that, as H. was not so indebted at the time his transfer was sent in to the secretary, they were bound to register, even though he was a director and was aware when he executed the transfer that a call was imminent.—A resolution for a call, to be valid, must state not only the amount of the call, but also the time at which it is to be paid. Thus, where the directors of a company passed a resolution for a call, and the resolution fixed the sum per share to be called up, but left the date at which it was to be paid in blank, and some time afterwards a resolution was passed fixing the date for payment, and notices of the call were sent to the shareholders:—*Held*, that there was no proper call made until the second resolution fixing the date of payment, and that the second resolution

COMPANY—*continued.*

did not, in point of date, relate back to the first.—The agenda paper of a directors' board-meeting contained, as the first business, the consideration of a transfer of shares sent to the secretary for registration; and then, as the next business, the consideration of the question whether a call should be made to meet the company's liabilities:—*Held*, by Chitty, J., that the directors were entitled to take their business at the meeting in any order they thought proper, and, in the exercise of their fiduciary power of making a call (*Gilbert's Case* (Law Rep. 5 Ch. 559)), to pass a resolution for a call as their first business so as to prevent the intending transferors from evading their liability by prior registration.—Order of Chitty, J., refusing an application under sect. 35 of the Companies Act, 1862, for registration of a transfer of shares, reversed. *In re* CAWLEY & Co. C. A. 209

8. —— *Winding-up—Debenture-holders—Appointment of Receiver by Debenture-holders—Application for Leave to Receiver to take Possession of all Company's Property—Discretion of Court.*] A company issued debentures constituting a first charge on the whole of their undertaking and property, and empowering the holders, in the event of proceedings for the winding-up of the company, to appoint a receiver invested with very ample powers of carrying on the company's business, and managing and disposing of their undertaking and property.—An order was made for the winding-up of the company, and an official liquidator was appointed. The debenture-holders, under their powers, appointed a receiver and applied to the Court that, notwithstanding the appointment of the liquidator, the receiver might be at liberty forthwith to take possession of all the company's undertaking and property:—*Held*, reversing the decision of Kay, J., that the Court ought not to interfere with the right of the debenture-holders to a receiver under their deed; and leave was given to the receiver appointed by them to take possession, notwithstanding the appointment of an official liquidator, but without prejudice to any question as to the powers of the receiver, other than the power to take possession and to sell the property. *In re* HENRY POUND, SON, & HUTCHINS - - - - 402

9. —— *Winding-up — Jurisdiction — Undertaking for Public Benefit — Statutory Powers.*] The Court has jurisdiction to make an order for the winding-up of a water company, incorporated by registration under the Companies Acts, upon which powers for the public benefit have been conferred by a provisional order of the Board of Trade (made under the Gas and Water Works Facilities Act, 1870, and afterwards confirmed by a special Act), though it might not be possible to sell the undertaking and property of the company without the authority of an Act of Parliament.—*Blaker* v. *Herts and Essex Waterworks Company* (41 Ch. D. 399) distinguished. *In re* BARTON-UPON-HUMBER AND DISTRICT WATER COMPANY 585

10. —— *Winding-up—Life Assurance Company—Transfer of Business — Scheme — Policy-holder—Insolvent Company—Life Assurance Companies Act*, 1870 (33 & 34 *Vict.* c. 61), *ss.* 2, 14—*Life Assurance Companies Act*, 1872 (35 & 36 *Vict.* c. 41), *s.* 7.] A life assurance company was incorporated in 1845 under a deed of settlement which contained no provision for the sale or transfer of its business. In 1865 the company took over the business of an annuity company, and covenanted, by deed, in 1866, to guarantee the payment of certain annuities. In August, 1887, a petition for the compulsory winding-up of the company was presented, which stood over in the hopes that some scheme of arrangement might be adopted. In July, 1889, a scheme was proposed by the policy-holders for transferring the policies, en bloc, to another company, on terms advantageous to the policy-holders, but involving a reduction of the amounts originally assured. The proposed scheme made no provision for the annuitants claiming under the deed of 1866. On the petition coming on again for hearing, application was made by the directors, at the instance of the policy-holders, for leave to present a petition under sect. 14 of the Life Assurance Companies Act, 1870, to obtain the sanction of the Court to the proposed scheme, and that in the meantime the hearing of the petition might again be postponed. The annuitants objected to the scheme, as did also the shareholders:—*Held*, that sect. 14 of the Life Assurance Companies Act, 1870, conferred no power on an assurance company to transfer its business to another company; that, assuming a company had power to transfer, this section only contemplated a transfer of the whole of the assurance business as a going concern without any reduction in the policies, or any fresh contracts with the policy-holders; that the annuitants under the deed of 1866 were "policy-holders" within the definition given by sect. 2, whose dissent, as representing more than one-tenth of the total amount assured, would, under sect. 14, be fatal to the scheme; that the scheme was therefore impossible and the application of the directors could not be allowed; that, as the company was hopelessly insolvent, the winding-up order must be made.—*Semble*, the dissent of one policy-holder would invalidate such a scheme as proposed. *In re* SOVEREIGN LIFE ASSURANCE COMPANY - - - - - - 540

11. —— *Winding-up—Proof for Arrears of Rent-charge—Land in Possession of Liquidators.*] An unregistered company were mortgagees in possession of land subject to a rent-charge created by deed. The company was wound up under the 203rd section of the Companies Act, 1862, and the liquidators for some time paid the rent-charge. Then, finding that the annual value of the property was not equal to the rent-charge, they obtained leave from the Court to get rid of the land, and gave notice to the tenant in occupation of the land and to the owner of the rent-charge that they repudiated the land. The owner of the rent-charge claimed to prove in the winding-up for arrears which had accrued since the repudiation:—*Held*, that the company were only liable so long as they were owners of the land; that the liquidators had sufficiently repudiated the ownership of the land, and that no subsequent claim could be made for the rent-charge.—*Thomas* v. *Sylvester* (Law Rep. 8 Q. B. 368) explained and followed. *In re* BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY. *Ex parte* GRAHAM C. A. 343

COMPANY—*continued.*

12. —— *Winding-up—Voluntary Winding-up—Arbitration—Liquidator—Commission to examine Witnesses Abroad—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 161, 162—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 100—*Rules of Supreme Court*, 1883, *Order* XXXVII., *r.* 5.] Where a company is in voluntary liquidation and a dispute has arisen as to the price to be paid for the purchase of the interest of a dissentient member which, under sect. 162 of the Companies Act, 1862, has been referred to arbitration, the Court, on the application of the liquidators, has jurisdiction under Order XXXVII., rule 5, of the Rules of the Supreme Court, 1883, to order a commission to issue for the examination of witnesses abroad, the matter being one arising in the winding-up within sect. 138 of the Companies Act, 1862, and the reference to arbitration being compulsory under the Act.—The Court will not give assistance to a domestic forum. *In re* MYSORE WEST GOLD MINING COMPANY - - - - 535

13. —— *Winding-up—Voluntary Winding-up—Creditor—Action commenced before Winding-up Resolution—Supervision Order—Rights of Creditor—Judgment Debt—Priority—Pari passu—Staying Proceedings—Leave to continue Proceedings—Discretion of Court—Costs of Action—Adding Costs to Debt—Companies Act*, 1862, *ss.* 87, 133, 163.] Although sect. 163 of the Companies Act, 1862, making void all proceedings against a company in liquidation taken after the commencement of the winding-up, applies in terms only to cases in which the company is being wound up by the Court, or subject to the supervision of the Court, and not to the case of a voluntary winding-up, yet, having regard to the scheme of the Act, and especially to sect. 133, which enacts that, as a consequence of a voluntary winding-up, the property of the company shall be applied in satisfaction of its liabilities pari passu, a creditor who, before the resolution to wind up, has commenced an action against the company but does not obtain judgment until after the resolution, is not entitled to enforce his judgment so as to obtain priority over other creditors for his judgment debt and costs: and if, subsequently to the judgment, a supervision order is made, the Court may, in the exercise of its discretion under sect. 87, either stay further proceedings in the action or allow the Plaintiff to continue them on terms.—Thus, where shortly after an action had been commenced in Scotland against an English company for damages for personal injuries to one of the company's workmen at their works in Scotland, the company passed a resolution to wind up voluntarily, and the Plaintiff in the action, though having notice of the resolution, proceeded with his action and obtained judgment for damages and costs, but before he was able to enforce his judgment by execution against the company's property in Scotland, an order was made in England continuing the winding-up under supervision, the Court allowed the Plaintiff to continue his proceedings under the judgment, but on the terms that he should have no priority over the other creditors in the winding-up; and that, so far as the proceedings in the action interfered with the winding-up, he should do all in his power to enable the liquidator to get in the company's assets in Scotland.—A creditor-plaintiff in an action against a company in voluntary liquidation is not entitled to any priority in the winding-up for his costs of the action: he can only add them to his debt. *In re* THURSO NEW GAS COMPANY - - - - - 486

14. —— *Winding-up—Voluntary Winding-up—Transfer of Business to another Company—Sanction of Court—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 161.] The sanction of the Court which is required to make a resolution under sect. 161 of the Companies Act, 1862, for a transfer of the business of a company to another company valid, in case an order is made within a year for winding up the company by or subject to the supervision of the Court, must be obtained at or after the making such order, and cannot be obtained previously in the matter of the voluntary winding-up.—Decision of North, J., affirmed. *In re* CALLAO BIS COMPANY - - C. A. 169

COMPENSATION—Conditions of sale—Misdescription - - - - - - 150
See VENDOR AND PURCHASER. 4.

CONDITIONS OF SALE—Compensation for mistake - - - - - 150
See VENDOR AND PURCHASER. 4.

—— Right to rescind - - - 375
See VENDOR AND PURCHASER. 1.

CONFLICT OF LAWS—*Lex loci contractûs—Intention of Parties—Clause in Contract void by Law of the Country of the Contract—Ship—Bill of Lading—Law of the Flag.*] When a contract is made in one country to be performed wholly or partially in another, primâ facie the contract is to be construed and enforced according to the lex loci contractûs; but the Court will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by positive law.—A contract was made in Massachusetts, U.S., between an American citizen and a British company of shipowners, by which the company undertook to carry certain cattle from Boston to England in a British ship. The contract contained a clause that the company should not be liable for the negligence of the master or crew of the ship. Such a clause is valid by English law, but void by the law of Massachusetts as being against public policy. The cattle were lost by the negligence of the master and crew, and the shipper claimed against the company for the loss: —*Held* (affirming the decision of Chitty, J.), that the contract itself showed that the parties intended it to be governed by English law, and that the stipulation exempting the company from liability through the negligence of their master and crew, not being immoral or forbidden by positive law but only void under the law of Massachusetts as being against public policy, would be enforced by an English Court: and the claim was dismissed. *In re* MISSOURI STEAMSHIP COMPANY - C. A. 321

CONTRARY INTENTION Will speaking from death - - - - 646
See POWER. 6.

CONTRIBUTORY - - - - - 1
See COMPANY. 5.

COPYHOLD – Presumption of enfranchisement
See VENDOR AND PURCHASER. 2. [254

COPYRIGHT — *Designs — Different Classes — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 58, 60, 90—*Designs Rules*, 1883.] Where a design has been registered in one or more of the classes of goods specified in Schedule 3 to the Designs Rules, 1883, for a particular article of a certain material, a similar design cannot be registered by another person in another class for a similar article made of a different material, as not being new and original within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 47. *In re* READ & GRESWELL'S DESIGN - - - - - 260

2. —— *Design – Novelty—Different Material —Different Classes—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 47.] A design already on the register may be registered in another class for an article applied to a different purpose, but not for an article merely of a different material.—A design for a lamp shade made of china in the shape of a rose was registered in one class. A design for a lamp shade made of linen, also in the shape of a rose, had previously been registered in another class:—*Held*, that though the materials were different, there was no novelty in the china design, which must, therefore (following *Le May* v. *Welch* (28 Ch. D. 211)), be removed from the register. *In re* BACH'S DESIGN - - 661

COSTS—Higher and lower scale - - 128
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—— Mortgage—Disputed right to redeem 610
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See TITLE DEEDS.

DAMAGES — *Detention of Goods — Measure of Damages—Right to Damages not taken away by Appointment of Receiver by Consent—Jurisdiction —Interest by way of Damages*—3 & 4 *Will.* 4, *c.* 42, *ss.* 28, 29—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2—*Wrongdoers—Vindictive Damages—Inquiry — Burden of Proof.*] Where property belonging to a plaintiff has been detained by the defendant under such circumstances as to give a right to damages, such right is not lost by the appointment of a receiver by consent, or by any other mode of placing the property in medio pending the trial of the action.—*Williams* v. *Peel River Land and Mineral Company* (55 L. T. (N.S.) 689) followed.—The Plaintiffs, a mercantile firm, brought an action against the Defendants, a trading company, for delivery to the Plaintiffs of certain cargoes then at sea, to which the Plaintiffs claimed to be entitled, for an injunction to prevent the Defendants from receiving them, and for damages for their detention. The Defendants by their pleadings claimed the right to receive the cargoes, and shewed that they intended to receive them. Previously to the hearing of the action orders were made by consent placing the cargoes in medio until the hearing. At the hearing the Plaintiffs proved their title to the cargoes:—*Held*, that the action must be considered an action of trover or detinue, brought in the Chancery Division by the Plaintiffs quia timent, in anticipation of and to prevent the actual threatened receipt by the Defendants; that the Court had jurisdiction to give damages; that the Plaintiffs were entitled to damages by way of compensation for their loss in respect of being kept out of possession of the cargoes, and that such loss was rightly measured by 5 per cent. interest upon the value of the cargoes down to the date of the judgment.—Consideration of the principles upon which vindictive damages are given against wrong-doers.—Judgment was given in an action declaring that the Defendants were not entitled to reimbursement for certain expenses incurred by them. On appeal to the House of Lords the judgment was varied by allowing the expenses "so far as the same have not been already repaid to them or allowed to them in account with" third persons, such qualifying words being inserted at the instance of the Plaintiffs:—*Held*, that the burden of proving repayment or allowance in account rested on the Plaintiffs. DREYFUS *v.* PERUVIAN GUANO COMPANY - 66

DEBENTURE—Right of holders to appoint receiver - - - - 402
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DEED—Charitable trust—Void altogether 312
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See COMPANY. 2.

—— Quorum—Invalidity - - - 160
See COMPANY. 3.

DISCLAIMER—Trade-mark - - 566
See TRADE-MARK. 3.

DISCOUNT—Issue of shares - - - 1, 98
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See EVIDENCE.

DOCUMENT—Evidence—Foreign register of births - - - - 282
See EVIDENCE.

ENFRANCHISEMENT—Copyhold—Presumption
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EVIDENCE—*Paternity of Child born in Wedlock—Presumption of Legitimacy—Evidence to rebut—Admissibility—Verbal Statements by Wife's Paramour—Public Document in Foreign Country—Secondary Evidence—Copy—Admissibility of Evidence of Husband to bastardize Child born in Wedlock*—14 & 15 *Vict. c.* 99, *s.* 7—32 & 33 *Vict. c.* 68, *s.* 3.] A husband and wife were married on the 30th of April, 1878, and there were three children born before the marriage was dissolved by reason of the wife's adultery with W. The decree nisi was made on the 3rd of November, 1886, and it was made absolute on the 17th of May, 1887. The three children were born respectively on the 2nd of July, 1881, the 26th of April, 1885, and the 25th of June, 1886. The legitimacy of the eldest child was admitted. That of the other two children was disputed:—*Held*, on the evidence, that the legal presumption of the legitimacy of the second child was rebutted, and that it was proved not to be the child of the husband:—*Held*, also, on evidence which satisfied the Court that the husband could have had no access to the wife between the birth of the second child and the birth of the third child, that the third child was also illegitimate:—*Held*, that evidence of verbal statements made by W. previously to the birth of the second child was admissible as evidence of conduct tending to shew that he was the father of the child.—It being proved that the register of births kept at the Mairie at Hyères could not be removed:—*Held*, that the contents of the entry of the birth of the second child could be proved by a copy the accuracy of which was proved by a witness who had himself compared it with the original:—*Held*, that, notwithstanding the provision of sect. 3 of the Act 32 & 33 Vict. c. 68, that the evidence of a husband or wife is admissible in a "proceeding instituted in consequence of adultery," the evidence of a husband is not admissible, after the dissolution of the marriage on the ground of the wife's adultery, to prove the illegitimacy of a child born in wedlock.—*Guardians of Nottingham* v. *Tomkinson* (4 C. P. D. 343), and *In re Walker* (W. N. 1885, p. 196), followed. BURNABY *v.* BAILLIE - - - - - - 282

—— Commission to examine witnesses abroad
See COMPANY. 12. [535

—— Cross examination—Adverse litigant 372
See PRACTICE. 4.

—— Presumption—Enfranchisement of copyhold - - - - - - 254
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See TRADE-MARK. 1.

FRAUD—Appointment in fraud of power - 9
See POWER. 2.

—— Prospectus of company - - - 436
See COMPANY. 2.

HOLY ORDERS—Eligibility for exhibition at College - - - - - 624
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HOTCHPOT CLAUSE - - - - 559
See POWER. 1.

HUSBAND AND WIFE—Legacy to husband and wife - - - - - - 306
See WILL. 2.

IMITATION—Trade name - - - 128
See TRADE NAME.

INFANT—*Trustee—Executor—"Property held by trustee in trust for an infant"—Bequest of Residue to Infant—Application of Income by Executors for Maintenance of Infant—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] A testatrix bequeathed "the residue of my money" to an infant:—*Held*, that, the estate being cleared and the residue ascertained, the executor would hold the residue in trust for the infant within the meaning of sect. 43 of the Conveyancing and Law of Property Act, 1881, and would be entitled to apply the income for the infant's maintenance, education, or benefit, as provided by that section. *In re* SMITH. HENDERSON-ROE *v.* HITCHINS - - - - 302

INJUNCTION—Nuisance - - - 685
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—— Patent - - - - 390, 665
See PATENT. 2, 3.

INSURANCE, LIFE—Liability for not keeping up - - - - - - 9
See POWER. 2.

INTEREST—*Will—Real Estate—Trust for Sale after Death of Tenant for Life—Legacy payable out of Proceeds of Sale—Interest, from what Time payable.*] A testator devised his real estate to his wife for life, and after her death to trustees in trust for sale, and out of the proceeds to retain a sum of £1000 to be held upon the trusts after declared: the residue of the proceeds to be divided into four equal shares, of which one was to be invested and held in trust for his daughter M. for life, with remainder to her children; and similar trusts were declared of the other three shares in favour of his three other daughters and their children. And he declared that the £1000, together with interest at 4 per cent. to the date of retainer, should be held upon the trusts declared of the said one-fourth share in favour of M. and her children. And he empowered his trustees to postpone the sale of his real estate for three years after the death of his wife, and declared that the rents of the unsold real estate should be applied as the income of the proceeds of sale would be applied if the premises had been sold and the proceeds invested.—The testator's widow survived him, and died. The trustees proposing to sell the real estate about two years and a half after her death, and to retain the £1000 out of the proceeds as directed by the will, the question arose whether, until such retainer, the £1000 carried interest at 4 per cent. from the death of the widow, or only from the expiration of one year afterwards:—*Held*, that the £1000 carried interest at 4 per cent. from the death of the widow.—*Turner* v. *Buck* (Law Rep. 18 Eq. 301) considered. *In re* WATERS. WATERS *v.* BOXER - - - - - 517

INTEREST—*continued.*
—— Mortgage—Redemption - - 610
See MORTGAGE. 4.
INVESTMENT—Trustee—Liability - 351
See TRUSTEE. 3.

LANDS CLAUSES ACT (8 & 9 *Vict. c.* 18), *s.* 80—*Costs — Railway Company — Land compulsorily taken — Purchase-money — Dealings with Land subsequently to Payment into Court—Payment out of Court.*] A railway company, under their compulsory powers, took land comprised in a settlement, and paid the purchase-money into Court. A testamentary appointment was subsequently made by the tenant for life under a power contained in the settlement, and on her death a petition was presented by her appointees for payment of the money out of Court. In consequence of the terms of the appointment, it became necessary to serve the petition upon the trustees of the marriage settlements of two of the appointees, and additional costs were occasioned:—*Held*, that the railway company, having taken the land subject to the possibility that in ordinary events it might be dealt with by way of settlement, must pay the costs (not being costs of adverse litigation) of all parties.—*Quære*, whether the same principle is not applicable to costs occasioned by incumbrances effected subsequently to the payment into Court. *In re* BROOSHOOFT'S SETTLEMENT - - 250
LEASEHOLDS—Voluntary assignment - 79
See VOLUNTARY SETTLEMENT.
LEGACY—Interest - - - - 517
See INTEREST.
LEGITIMACY — Evidence — Presumption — Divorce - - - - 282
See EVIDENCE.
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See CONFLICT OF LAWS.
LICENSE—Patent—Effect of - - 461
See PATENT. 1.
LIEN—Solicitor's costs - - - 190
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—— Unpaid vendor—Will - - - 550
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LIMITATIONS, STATUTE OF—Acknowledgment—Bill of costs—Taxation - 424
See SOLICITOR. 1.
—— Enfranchisement of copyhold - 254
See VENDOR AND PURCHASER. 2.
—— Void charitable trust - - - 312
See CHARITY.
LIQUIDATOR—Repudiation of land—Recovery of rent-charge - - - 343
See COMPANY. 11.
LOCAL BOARD - - - - 602
See LOCAL GOVERNMENT ACTS.
LOCAL GOVERNMENT ACTS—*Local Board—Bye-laws — Validity — "New Street" — Width — "Construction"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.] The bye-laws of a local board provided: (4.) "Every person who shall lay out a new street shall so lay out such street that the width thereof shall be forty feet at the least." (6.) "Every person who shall construct a new street shall provide at one end, at least, of such street an entrance of a width equal to the width of such street, and open from the ground upwards:—*Held*, that the 6th bye-law was intra vires and reasonable, and that it prevented a landowner from "constructing" a new street upon his land until he had provided an "entrance" to the new street of the specified width, even though that entrance could only be made upon the land of another person over whom he had no control:—*Held*, also, that the "construction" of a new street included the building of the houses abutting on it, and, consequently, that the landowner could not, until an adequate entrance had been provided, erect houses abutting on the proposed new street. HENDON LOCAL BOARD *v.* POUNCE 602
LUNATIC—*Promissory Note, payable by Instalments, given while sane—Absence of Consideration—Moral Obligation—Payment out of Lunatic's Estate of Unpaid Instalments—Rights of Holder of Note—Form of Petition.*] The payee of a promissory note given without consideration is not, even in the administration of a solvent estate, in the same position as the payee of a voluntary bond, so as to be entitled to claim against the estate after creditors for value.—A lunatic, while sane, had given a promissory note for £50,000, payable in instalments of £5000 each, in discharge of what he considered was a moral obligation, and had paid three of such instalments.—Upon a claim made against his estate, which was a very large one, after he had been found lunatic, by the holder of the note for the sum of £35,000, being the amount of the unpaid instalments thereon, to which claim the next of kin consented:—*Held*, that although, as the gift was voluntary, the payee of the note was not entitled to claim as a creditor against the lunatic's estate, the Court in the exercise of its discretion would order the payment to be made thereout, by way of bounty and as in discharge of a debt of honour on the part of the lunatic, which, under the circumstances, it ought to recognise:—*Held*, also, that the application should have been made by the committee and that he must be joined as co-petitioner.—*Dawson* v. *Kearton* (3 Sm. & Giff. 186), *Lloyd* v. *Chune* (2 Giff. 441), *Arthur* v. *Clarkson* (35 Beav. 458), and *In re Richards* (36 Ch. D. 541), criticised. *In re* WHITAKER (A PERSON OF UNSOUND MIND) [C. A. 119
MAINTENANCE—Infant—Application of income of trust money - - - 302
See INFANT.
MARKET—*Disturbance—Tolls — Penalties — Alteration by Statute—Modern Market.*] The Commissioners of a town were by their Act incorporating the Markets and Fairs Clauses Act, 1847, empowered to set up a market and take tolls for articles sold therein.—Sect. 47 of the Local Act imposed tolls on all persons selling except on premises in their own occupation.—Sect. 13 of the Consolidation Act imposes penalties on all persons selling except in their own dwellings or shops:—*Held*, that an auctioneer holding sales on a field in his own occupation could not be sued for

MARKET—*continued.*
disturbance of the market, though apart from the special Act that mode of sale would have been a disturbance of an ancient market. ABERGAVENNY IMPROVEMENT COMMISSIONERS *v.* STRAKER - 83

2. —— *Disturbance—Auctioneer—Penalties—Modern Market.*] The Commissioners of a town were by their Act incorporating the Markets and Fairs Act, 1847, empowered to set up a market and take tolls for articles sold therein:—*Held*, on the construction of the two Acts, that an auctioneer holding sales on a field in his own occupation was not subject to penalties. RUTHERFORD *v.* STRAKER - - - - - 85, n.

MEASURE OF DAMAGES - - - 66
See DAMAGES.

MISTAKE—Conditions of sale—Compensation
See VENDOR AND PURCHASER. 4. [150
—— Registration of bill of sale - - 471
See BILL OF SALE.

MONEY—Securities for—Bequest of - 550
See WILL. 4.

MORTGAGE—*Equitable Mortgagee—Conflicting Equities—Priority—Negligence—Custody of Title Deeds—Trustee and Cestui que trust.*] The Plaintiff purchased an equity of redemption in leaseholds, and for his own convenience took the assignment in the name of C. as trustee, who executed a declaration of trust in favour of the Plaintiff. C. fraudulently borrowed money of the Defendants, representing himself as the absolute owner, executed an equitable charge by demise of the equity of redemption to the Defendants, deposited with them the deed of assignment, and absconded. C. was a confidential clerk, whose duty it was to put away in the safe the Plaintiff's securities. In an action by the Plaintiff for a declaration that the Defendants had no interest or claim in the leaseholds, and for delivery up of the deed of assignment:—*Held*, that the fact that the Plaintiff had under the circumstances allowed C. to have the custody of the deed of assignment was not negligence sufficient to deprive him of the benefit of his prior equitable title.—The ordinary recitals and forms commonly used in conveyances and assignments to trustees with a view of keeping all notice of the trust off the title, are not misrepresentations on the face of the document which will displace the equitable title of a cestui que trust, even though they may have been fraudulently made use of by a dishonest trustee to shew that he was in fact the absolute owner.—*Shropshire Union Railways and Canal Company* v. *Reg.* (Law Rep. 7 H. L. 496) discussed. CARRITT *v.* REAL AND PERSONAL ADVANCE COMPANY - - - - - - 263

2. —— *Mortgages in possession—Public-house—Account—Trade Profit—Proviso limiting Sums to be recovered on Mortgage.*] Mortgagees in possession, who were brewers, let the premises with a restriction that the tenant should take his supply of beer entirely from them:—*Held* (affirming the decision of North, J.), that the mortgagees must account for such additional rent as they would have made if the premises had been let without restrictions, but not for the profit which they made by the sale of beer to the tenant.—The mortgage was of a leasehold public-house to secure £700, and such further sums as might become due from the mortgagor to the mortgagees for money advanced, goods sold, or otherwise. The mortgage contained a power of sale, and it was declared that the sale moneys should after payment of the costs of sale, or in anywise consequent on the mortgagor's default, and the reimbursement to the mortgagees of all moneys paid by them for insurance or repairs, or for keeping on foot the lease and the licenses, be applied in payment of the principal and interest due on the mortgage, and subject thereto, in payment of the principal and interest due to a second mortgagee, and that the surplus should be paid to the mortgagor, "Provided always that the total amount to be recovered by the mortgagee under these presents shall not exceed £900." The property was sold under the power, and on the account being taken by the Court it was certified that at the time of the completion of the sale there was due to the mortgagees £1415 principal and £615 interest, and that they had or might have received £396 for rents and profits. The property sold for £2650. The £1415 included the £700 lent and £88 for goods supplied, the rest of it was made up of payments of rent and fire insurance:—*Held*, that the proviso limiting the amount recoverable did not apply to interest, or to outgoings incident to the possession of the premises which the mortgagor was bound to reimburse to the mortgagees, and that as the sum due for moneys lent and goods supplied did not exceed the limit, the mortgagees were entitled to retain out of the proceeds of sale the balance due to them. WHITE *v.* CITY OF LONDON BREWERY COMPANY [C. A. 237

3. —— *Mortgagee in possession—Right to give up possession—Right to Appointment of Receiver—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] Under sub-sect. 8 of sect. 25 of the Judicature Act. 1873, the Court has a discretion as to the appointment of a receiver.—A receiver may be appointed at the instance of a legal mortgagee, but he has no absolute right to a receiver.—The power given by sub-sect. 8 of sect. 25 can be exercised at the trial of an action, as well as upon an interlocutory application.—A mortgagee who has once taken possession of the mortgaged property cannot relinquish possession at his pleasure; having once assumed the responsibilities attaching to a mortgagee in possession, he cannot at his own pleasure get rid of them, and as a general rule the Court will not by appointing a receiver assist him to do so. *Mason* v. *Westoby* (32 Ch. D. 206) considered. *In re* PRYTHERCH. PRYTHERCH *v.* WILLIAMS - - - 590

4. —— *Redemption—Tender of Principal, Interest, and Costs—Right to redeem disputed—Computation of Interest—Costs.*] The Defendants mortgaged leasehold property to the Plaintiffs, and afterwards sold and assigned the equity of redemption therein to A. B., who further charged the property in favour of the Plaintiffs. A. B. having become insolvent, the Plaintiffs brought an action against the Defendants upon the covenants in the original mortgage for the principal money and interest thereby secured.—The Defendants then took out a summons asking that,

MORTGAGE—*continued.*
upon payment within one month of the principal money claimed in the action, with interest down to the date of payment, and costs, all further proceedings in the action might be stayed, and that the Plaintiffs upon such payment might reconvey the mortgaged property to the Defendants. The Plaintiffs refused to reconvey except upon payment of the moneys payable under the further charge as well as those payable under the mortgage.—A special case was then stated in the action, upon which the question was decided against the Plaintiffs, the costs being reserved.—Accounts were then taken in the action as between the Plaintiffs and Defendants, including an account of what was due under the mortgage, and in taking such accounts the Chief Clerk computed and certified interest on the principal moneys secured by the mortgage down to the date of payment.—Upon a summons taken out by the Defendants to vary the Chief Clerk's certificate by disallowing all interest subsequent to the date of the summons to stay proceedings:—*Held*, that that the summons for the stay of proceedings was not equivalent to a tender by the Defendants, and that interest must be paid by them down to the date of the payment of the principal.—Upon the further consideration of the action:—*Held*, that the Plaintiffs were not entitled to such part of the costs of the action as were occasioned by their having unsuccessfully disputed the Defendants' right to redeem. KINNAIRD *v.* TROLLOPE - 610

—— Building society—Power of sale - 23
See VENDOR AND PURCHASER. 3.

—— Title—Abstract—Will - - 23
See VENDOR AND PURCHASER. 3.

MORTGAGEE IN POSSESSION - 237, 590
See MORTGAGE. 2, 3.

MORTMAIN - - 312
See CHARITY. 1.

MUNICIPAL CORPORATION—Public Libraries Act - - - - - 178
See PUBLIC LIBRARIES ACTS.

NEGLIGENCE—Priority of mortgages - 263
See MORTGAGE. 1.

NEXT-OF-KIN—Trust for—Time of ascertaining
See SETTLEMENT. 2. [529

NOTICE—License to use patent - - 461
See PATENT. 1.

NUISANCE — *Injunction — Injury — Adjoining Houses — Cellar — Stove—Reasonable Use.*] The Defendants, keeping a hotel in London, had put up a stove, the heat of which rendered the cellar of the adjoining house unfit for storing wine:—*Held*, that though the Defendants were acting reasonably in the use of their house, yet as they caused serious annoyance and injury to the Plaintiff, the Court would interfere and protect the Plaintiff; the jurisdiction of the Court not depending on the question of reasonable use.—*Bamford* v. *Turnley* (3 B. & S. 62), and *Gaunt* v. *Fynney* (Law Rep. 8 Ch. 8) discussed.—*Broder* v. *Saillard* (2 Ch. D. 692) followed. REINHARDT *v.* MENTASTI - - - - - 685

OWNERS AND OCCUPIERS—Rating 178
See PUBLIC LIBRARIES ACTS.

PAROL EVIDENCE—Legitimacy—Adultery 282
See EVIDENCE.

PATENT—*Exclusive License for limited Time and Area—Right of Licensee to sue—Non-joinder of Patentee — Effect of License—Registration—Sub-Purchase—User within Area of patented Article purchased outside Area—Notice—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 36, 87.] An exclusive license is a leave to do a thing, and a contract not to allow any one else to do the thing; but, unless coupled with a grant, it confers no more than any other license any interest or property in the thing, and the licensee has no title to sue in his own name.—A patentee of machinery, by deed duly registered under the Patents, Designs, and Trade Marks Act, 1883, s. 23, granted to the Plaintiff the full and exclusive license to use and exercise the patented invention within a specified district for a limited period, and covenanted during that period not to sell or to grant any license to exercise or use the invention to any other person in the same district; and in case the patent should be infringed, he covenanted to take all necessary proceedings for defending the same, and that in default of his so doing it should be lawful for the Plaintiff to take such proceedings in his (the patentee's) name.—The patentee afterwards sold two of the patented machines to firms outside the specified district, and these firms sold them to the Defendants, who used them within the district; and it was in dispute whether or not the Defendants had actual notice of the exclusive license at the time of their purchase.—Upon an action brought in the County Palatine Court of Lancaster by the Plaintiff in his own name, and without joining the patentee, against the Defendants, it was held by the Vice-Chancellor, in dismissing the action, first, that registration under the Patents, Designs, and Trade Marks Act was not notice to all the world; secondly, that upon the evidence the Defendants had no actual notice of the exclusive license at the time of their purchase; thirdly, that the Defendants, being purchasers for value without notice, were not affected by the license; and fourthly, that it was doubtful whether an action for infringement of rights under a license could be brought by an exclusive licensee in his own name, without joining the patentee as co-Plaintiff:—*Held*, by the Court of Appeal, in dismissing the appeal, first, that actual notice had not been proved against the Defendants; secondly, that the exclusive license, being simply an authority to do lawfully that which would otherwise have been unlawful, and not being a license coupled with or equivalent to a grant, did not entitle the licensee to sue in his own name without joining the patentee, and this being so, that it was immaterial to consider the effect of registration under the Act of 1883. HEAP *v.* HARTLEY [C. A. 461

2. —— *Past Infringement of Patent—Intention to infringe.*] In August, 1882, A. set up in B.'s factory four machines of his own make to be taken and paid for if they worked to B.'s satisfaction. They were used till April, 1883, when B., being

PATENT—*continued.*

dissatisfied with them, took them down, laid them in his yard, called on A. to take them away, and never used them again. A. did not take them away till January, 1885. In March, 1887, P., who had obtained a judgment against A. that A.'s machines were an infringement of a patent belonging to him, claimed royalties from B. B. replied that P. could satisfy himself by calling at B.'s mill that B. was using neither P.'s nor A.'s machines, and had no intention of so doing. Further correspondence took place, and B. denied all liability, alleging that he had not bought the machines from A., who had set them up on trial, and as they did not work well had to take them down, and that B. had not used and was not using any machine which infringed P.'s patent. In January, 1888, P. brought his action in the Chancery of the County Palatine against B. for an injunction and an account or damages. B. put in a defence denying infringement, and stating that if he ever had used machines infringing the patent such user had been discontinued long before the action, as the Plaintiff knew, and that B. never threatened or intended and did not threaten or intend to use any apparatus infringing the patent. The Vice-Chancellor granted an injunction and an inquiry as to damages:—*Held*, on appeal, that though B. had infringed the patent, it was not to be inferred from the circumstances that he had any intention to infringe it again, and that P. if he had made such inquiry as he ought would have discovered this; that there was, therefore, no case for an injunction, and that (the Court of the County Palatine having only the old Chancery jurisdiction) damages could not in that case be given. The judgment of the Vice-Chancellor was therefore discharged, but as B. had not given full information, which would probably have prevented litigation, the action was dismissed without costs, the Defendant receiving only his costs of the appeal.—*Millington* v. *Fox* (3 My. & C. 338) distinguished. PROCTOR *v.* BAYLEY - C. A. 390

3. —— *Threats—Action to restrain—Cross-action for Infringement—Costs—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] A solicitor's letter saying that proceedings will be instituted is a threat within the meaning of sect. 32 of the Patents, Designs, and Trade Marks Act, 1883.—The action for infringement pointed at by the section is an action by the patentee against the person whom he has threatened, not against any other person who may be infringing.—Where there is an action to restrain threats the Defendant is not bound to assert his rights by defence or counter-claim, but is entitled to bring a separate action for the alleged infringement of his patent. But if he does so, arrangements ought to be made so that the proceedings in one action should be stayed to abide the result of the trial in the other.—A. commenced an action under sect. 32 of the Patents, Designs, and Trade Marks Act, 1883, against B. to restrain threats. B. within ten days brought a cross-action against A. for infringing his patent. After pleadings had been delivered and notice of trial given in both actions, A. offered to stay his action for threats until B.'s action was concluded; but B. refused, and forced A. to proceed, and both actions came on together for trial. B.'s action having been dismissed with costs:—*Held*, (1) that, on the true construction of the section, A.'s right of action was taken away by B. having within a reasonable time commenced and prosecuted with due diligence his cross-action for infringement; and (2) therefore, that A.'s action must be dismissed, but, under the circumstances, without costs. COMBINED WEIGHING AND ADVERTISING COMPANY *v.* AUTOMATIC WEIGHING MACHINE COMPANY - 665

PAYMENT OUT OF COURT—Lands Clauses Act *See* LANDS CLAUSES ACT. [250

PENALTY—Disturbance of market 83, 85, n.
See MARKET. 1, 2.

PERPETUITY - - - - 494
See POWER. 4.

POLICY—Life insurance—Liability - 9
See POWER. 2.

—— Life insurance company—Winding-up 540
See COMPANY. 10.

POWER — *Appointment — Administration — Appointed Funds—Payment of Portion of—Subsequent Loss — Deficiency — Incidence of Loss — Hotchpot.*] Trust funds were appointed in pursuance of a power in a deed which contained no hotchpot clause, and certain of the appointees were rightly paid a portion of the sums so appointed to them. Afterwards an unavoidable loss occurred by which the trust funds were rendered insufficient to pay all the appointees in full:—*Held*, that the balance of the fund belonged to all the appointees in proportion to the unpaid amounts, and that the payments which had been rightly made to some of the appointees were not to be brought into account as under a hotchpot clause. *In re* BACON'S SETTLEMENT TRUSTS. HUTTON *v.* ANDERSON - - - 559

2. —— *Appointment — Fraud on Power — Policy of Assurance—Measure of Liability of Estate of Appointor—Restitution.*] A sum of stock was settled in 1834 upon trust to keep up a policy of assurance on the life of D., and subject thereto upon trust for D. for life, and after his decease the fund and the moneys payable under the policy were to be held in trust for his three children, or such one or more of them, and in such shares and proportions, as D. should by deed or will appoint. In 1849 and 1850, D. and the three children released the trustees from the stock and from all liability to keep up the policy, D. entering into a covenant to keep it up, and the stock was transferred by the trustees. In 1852 D. appointed the policy to B., one of his daughters, to her separate use, without restraint on anticipation, upon a bargain with her that she should surrender the policy and pay the money to him. He promised her to effect and keep on foot a fresh policy, and to settle it upon the same trusts as the old one. The trustees, having no notice of the bargain, transferred the policy to B., who surrendered it to the office and paid the proceeds to D. D. effected the new policy, but failed to devote it effectually to the trusts. The money received on the surrender of the policy was £897, but the sum which would have been payable under it if it had been kept on foot till D.'s death was more than £5000:

POWER—*continued.*

—*Held*, by Kekewich, J., that the appointment was invalid, and that D.'s estate after his death was liable not merely for the £897 which he had received, but for the sum which would have been received under the policy if it had been kept on foot, for that D. had virtually received the policy; and that the £5000 must be raised out of his estate and be distributed as in default of appointment:—*Held*, on appeal, that (apart from the question of B.'s concurrence) this was the correct measure of liability, for that a person making a fraudulent appointment ought to be held liable to make good the whole loss occasioned by it to the trust estate, and that, moreover, D. was liable under his covenant to make good all loss arising from his not having kept the policy on foot; but that B. having been an active party to the transaction could not complain of it, and that the amount payable by D.'s estate must be diminished by the share which she, if not a party to the transaction, would have taken in default of appointment, and that D.'s promise to settle a fresh policy, which promise he failed to keep, was not a misrepresentation entitling her to say that she had been deceived into concurring in the transaction and was to be treated as if she had not concurred. *In re* DEANE. BRIDGER *v.* DEANE [C. A. 9

3. —— *Appointment—General Devise—Special Power—Will not referring to Power—Wills Act (1 Vict. c. 26), ss. 24, 27.*] The donee of a special power by will to direct trustees to pay to his wife for life the income of settled real estate held by them on trust for sale and conversion, having no real estate of his own, by his will devised and bequeathed all his real and personal estate to his wife absolutely.—The will contained no reference to the special power or to the property comprised therein:—*Held* (affirming the decision of Kay, J.), that the general devise and bequest in the will did not operate as an exercise of the power.—*In re Mills* (34 Ch. D. 186) approved. *In re* WILLIAMS. FOULKES *v.* WILLIAMS - - - C. A. 93

4. —— *Appointment—Perpetuity—Remoteness—Legal Limitations—Limitation to unborn Person for Life with Remainder to her Children born before particular Period—Restraint on Anticipation—Testamentary Power of Appointment given to unborn Person.*] The rule applicable to legal limitations, that an estate cannot be limited to an unborn person for life followed by any estate to any child of such unborn person, is an absolute rule, independent of the rule against perpetuities whereby property cannot be tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of the period of an actually existing gestation.—By a marriage settlement lands were limited to the use of the husband and wife successively for life, with remainder to the use of their issue (born before any appointment made) as they should by deed appoint. They by deed appointed part of the lands to the use of their daughter for life for her separate use without power of anticipation, and after her decease to the use of such person or persons as she should by will appoint, and in default of appointment to the use of her children living at the date of that deed as tenants in common in fee:—*Held*, that the only part of the appointment which was good was the gift to the daughter for life for her separate use. WHITBY *v.* MITCHELL - 494

5. —— *Appointment — Revocation — Joint Power to Husband and Wife — Reservation of Power of Revocation to Husband alone—Fraud on Power.*] By the settlement made on a marriage a sum of £10,000 was vested in trustees, upon trust to pay the income to the husband during his life; with remainder to the wife during her life or until she should marry again; with remainder, as to the capital, in trust for the issue of the marriage as the husband and wife should by deed, with or without power of revocation and new appointment, jointly appoint, and, in default of appointment, as the survivor should by deed or will appoint, and, in default of appointment, for the children of the marriage as therein mentioned; but, if there should be only one child who should attain twenty-one or marry, as to one moiety of the trust fund in trust for that only child, and as to the other moiety upon the trusts thereinafter declared of the whole fund in case there should be no child of the marriage; and if there should be no child of the marriage, the trustees were, after the determination of the prior trusts and the default of children (which should last happen), to hold the fund in trust for the husband.—A decree nisi for the dissolution of the marriage was made on the 3rd of November, 1886. On the 11th of May, 1887, the husband and wife executed a deed by which, in exercise of the joint power contained in the settlement, they irrevocably appointed that, from and after the death of the husband and the death or re-marriage of the wife, one moiety of the trust fund should be held in trust for R. (the only child of the marriage), absolutely, if and when she should attain twenty-one or marry under that age; and by the same deed the husband and wife appointed the other moiety of the fund to R. in the same way, but subject to a power of revocation and new appointment reserved to the husband alone.—On the 18th of May, 1887, the day after the decree absolute, another deed was executed by the husband and the divorced wife by which she released her life interest in the trust fund in the event of her surviving the husband, and she also renounced and released to him all power of appointment over the fund. On the 30th of November, 1887, the husband executed a deed-poll, by which he absolutely revoked the appointment of the second moiety of the trust fund to R., to the intent that the moiety might devolve as if that appointment had not been made, but subject to any appointment to be thereafter made by him.—The husband claimed a declaration that the trustees of the settlement ought to treat a moiety of the £10,000 as if there were no child of the marriage:—*Held*, that the reservation in the deed of the 11th May, 1887, of a power of revocation to the husband alone was invalid, and that he was not entitled to call on the trustees to hand over a moiety of the £10,000 to him. BURNABY *v.* BAILLIE [282

6. —— *Appointment — Revocation — Special Power—Appointment by Will—Subsequent inconsistent Appointment by Deed with Power of Revocation—Will speaking from Death—Effect of Will*

POWER—*continued.*

—"*Contrary Intention*"—*General and particular Intention—Election—Wills Act* (1 *Vict. c.* 26), *ss.* 19, 23, 24, 27.] By a settlement made in 1842 on the marriage of a female infant, the husband and wife covenanted that as soon as the wife attained twenty-one certain real estate to which she was entitled as tenant in tail, and certain personal property belonging to her, should be conveyed and assigned to trustees upon trust after the death of the wife for the children of the marriage as the husband and wife by deed, or the survivor of them by deed with or without power of revocation and new appointment, or by will, should appoint, and in default of appointment in trust for the children of the marriage in equal shares—and by the same settlement the husband assigned a policy of assurance upon his own life to the trustees upon the same trusts.—The joint power of appointment was never exercised, and the wife died in 1857, without having executed any disentailing assurance of the real estate. Her eldest son entered into possession of the real estate as tenant in tail. In 1864 the husband, by deed reciting that the eldest son was the heir in tail of his mother, appointed all the trust funds comprised in the settlement, other than the real estate, to the four younger children, and reserved to himself a power of revocation and new appointment by deed or will. The trustees then divided the trust funds, with the exception of the moneys secured by the policy, between the four younger children.—In 1869 the husband by will, in express exercise of the power contained in the marriage settlement, appointed specific sums of money to the eldest son and three of the younger children, and appointed the residue of the settlement funds to the eldest son.—In 1878, by deed, reciting the deed of 1864, the division amongst the four younger children, and that the moneys secured by the policy were the only fund remaining subject to the trusts of the settlement, the husband, in exercise of the power reserved by the deed of 1864, revoked the appointment thereby made, and appointed the policy moneys in equal fifths between his eldest son, his three surviving younger children, and the three children of a deceased younger child, and again reserved to himself a power of revocation.—In 1883 the husband by deed made the appointment of 1878 in favour of his eldest son, irrevocable, and in 1888 the husband died.—Upon a summons to obtain the opinion of the Court as to who were the persons entitled under the settlement:—*Held*, first, that the date of the husband's will being before that of the deed of 1878 there was sufficient evidence of "a contrary intention" within sect. 24 of the Wills Act, and consequently that the will did not speak from the death of the testator so as to revoke the appointment by that deed:—*Held*, secondly, that as the deed of 1878, although removing four-fifths of the fund from the operation of the will, did not purport to revoke it, the will under sect. 19 of the Wills Act remained in force, and operated as to the one-fifth ineffectually appointed by the deed of 1878 to the grand-children of the testator:—*Held*, thirdly, that, having regard to the intention shown by the appointor in the deed of 1878, the eldest son was not bound to elect between the real estate which devolved on him as tenant in tail, and the interest appointed to him by that deed; but that he was bound to elect between such real estate and the benefits derived by him under the will, inasmuch as the will took effect by the operation of law and independently of the intention of the testator. *In re* WELLS' TRUSTS. HARDISTY *v.* WELLS - 646

—— To appoint trustees - - - 522
See SETTLEMENT. 1.

PRACTICE—*Administration Action—Order in Chambers—"Further Consideration"—"Final Order"—Appeal—Time—Motion to discharge—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15.] The time of one year allowed by the Rules of the Supreme Court, 1883, Order LVIII., r. 15, for appealing to the Court of Appeal from a final order made in Court will not be extended, by analogy, to the case of a motion to discharge a final order made by the Chief Clerk in Chambers. Except by leave, no longer time will be allowed for moving to discharge an order made in Chambers that is a final order than for moving to discharge an order so made that is not a final order. If a longer time is required for moving to discharge a final order made in Chambers, application should be made to enlarge the time.—An order made in Chambers on "further consideration," in an administration action, leaving part of the fund to be dealt with thereafter and reserving liberty to apply, is not a "final order." *In re* JOHNSON. MANCHESTER AND LIVERPOOL BANKING COMPANY *v.* BEALES. JOHNSON *v.* HOOLEY - - 505

2. —— *Appeal—Service on Third Party—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 2.] A third party who has been served by a Defendant under Order XVI. and has obtained leave to appear at the trial, is not a person directly affected by an appeal by the Plaintiff within the meaning of Order LVIII., r. 2, and need not be served by the Plaintiff with notice of the appeal; but the Defendant, if he desires him to be served, ought to obtain leave of the Court to serve him.—*In re* SALMON. PRIEST *v.* UPPLEBY C. A. 351

3. —— *Third Party—Directions—No Pleading—Right to appear—Default—Indemnity—Costs of Defence which failed—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 52.] An action was brought for specific performance of a contract. The Defendant pleaded that he was not liable on the ground that he signed the contract as agent for another person.—The Defendant served a third party notice on the other person who appeared and took no further proceedings. The Defendant obtained an order that the question as to the liability of the third party should be tried as soon as might be after the trial of the action:—*Held*, that the third party might appear by counsel and have the question tried immediately after the trial of the action, without having obtained directions as to pleading or otherwise; and that if the Defendant wished for such directions he should have taken steps to have them given:—*Held* on the evidence, on the question of liability, that as between the Plaintiff and the Defendant the Defendant was liable, but that the Defendant was to be indemnified by the third party, who was to

PRACTICE—*continued.*
pay the costs of the third party proceedings between him and the Defendant; but that the Defendant having set up a defence which failed must pay the costs of the action. BLOHE v. ASHBY [682

4. —— *Witness—Right to cross-examine—Adverse Litigant.*] A party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the Judge. Whether the witness is a litigant or not, it is a matter of discretion in the Judge whether he shews himself so hostile as to justify his cross-examination by the party calling him.—Dictum of Best, C.J., in *Clarke* v. *Saffery* (Ry. & Mood. 126) disapproved. PRICE v. MANNING [C. A. 372

—— Costs—Higher and lower scale - 128
See TRADE NAME.

—— Staying execution - - - 471
See BILL OF SALE.

PRESUMPTION — Legitimacy — Child born in wedlock—Divorce - - - 282
See EVIDENCE.

PRIORITY—Bills of sale - - - 471
See BILL OF SALE.

—— Judgment—Winding-up of company 486
See COMPANY. 13.

—— Mortgage—Negligence - - 263
See MORTGAGE. 1.

PROMISSORY NOTE—Lunatic—Voluntary gift
See LUNATIC. [119

PROSPECTUS—Misrepresentation - - 436
See COMPANY. 2.

PUBLIC-HOUSE—Mortgage—Account of profits
See MORTGAGE. 2. [237

PUBLIC LIBRARIES ACTS—*Requisition by Ratepayers to Mayor to ascertain Opinions of Ratepayers—Poll taken as to adoption of Acts by issuing Voting Papers to Occupiers—Owners or Occupiers entitled to vote.*] Under the Public Libraries Amendment Act, 1877, the persons to vote are "the inhabitants who would have to pay the assessment":—*Held*, that in cases where owners were made rateable in place of occupiers the occupiers were nevertheless the inhabitants, who would have to pay, inasmuch as the rates paid by the owners are for the purpose of the qualification to vote made attributable to the occupiers by the joint effect of sect. 147 of the Municipal Corporations Act, 1882, and sects. 7 and 19 of the Poor Rate Assessment and Collection Act, 1869.—Therefore, the mayor of the municipal borough of Croydon having received a requisition from ten ratepayers, under the provisions of the Public Libraries Act, 1866 (29 & 30 Vict. c. 114), calling upon him to ascertain the opinions of the ratepayers of the borough as to the adoption of the Public Libraries Acts, acted properly in issuing, under the provisions of the Public Libraries Amendment Act, 1877 (40 & 41 Vict. c. 54), voting papers to the occupiers, and not to the owners, of premises in the borough. ATTORNEY-GENERAL v. CORPORATION OF CROYDON [178

PUBLIC UNDERTAKING—Winding-up order
See COMPANY. 9. [585

PURCHASE-MONEY—Lands Clauses Act 250
See LANDS CLAUSES ACT.

RAILWAY COMPANY—Lands Clauses Act 250
See LANDS CLAUSES ACT.

RATIFICATION—Invalid allotment of shares
See COMPANY. 3. [160

RECEIVER—Debenture-holders—Winding-up
See COMPANY. 8. [402

—— Legal mortgagees—Right to - - 590
See MORTGAGE. 3.

REDEMPTION—Disputed right—Costs - 610
See MORTGAGE. 4.

REGISTRATION—Bill of sale - - 471
See BILL OF SALE.

—— Designs - - - - - 260, 661
See COPYRIGHT. 1, 2.

—— Patent - - - - - 461
See PATENT. 1.

—— Shares - - - - - 209
See COMPANY. 7.

—— Trade-mark - - - 274, 691
See TRADE-MARK. 1, 2.

REMOTENESS - - - - 494
See POWER. 4.

RENT-CHARGE—Recovery of - - 343
See COMPANY. 11.

REPUDIATION—Ownership of land - 343
See COMPANY. 11.

—— Shares - - - - 98, 160
See COMPANY. 3, 4.

REQUISITIONS—Unwillingness to comply with
See VENDOR AND PURCHASER. 1. [375

RESCISSION—Contract of sale—Requisitions
See VENDOR AND PURCHASER. 1. [375

RESIDUE—Lapsed share - - - 62
See WILL. 3.

RESOLUTION—Directors of company—Order of business - - - - 209
See COMPANY. 7.

REVOCATION—Appointment - 282, 646
See POWER. 5, 6.

RULES OF SUPREME COURT, 1883, Order XVI., r. 52 - - - - - 682
See PRACTICE. 3.

—— **Order XXXVII., r. 5** - - - 535
See COMPANY. 12.

—— **Order LVIII., r. 2** - - - 351
See PRACTICE. 2.

—— —— **r. 15** - - - - 505
See PRACTICE. 1.

SERVICE—Appeal—Third party - - 351
See PRACTICE. 2.

SETTLEMENT—*Power to appoint new Trustees—"Other"—Person or Persons—Donee of Power appointing himself, Appointment held invalid.*] By a marriage settlement property belonging to the wife was settled on trusts in favour of the wife, her children, appointees, and next of kin, and if any trustee should die, or go to reside abroad, or

SETTLEMENT—*continued.*

desire to retire from, or refuse or become incapable to act in, the trusts, the husband and wife, or the survivor, and after the decease of such survivor, the continuing trustees or trustee, or, if no continuing trustee, the retiring or refusing trustees or trustee, or the executors or administrators of the last acting trustee, were empowered to appoint any "other" person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act. The husband and wife, in exercise of the power, purported to appoint the husband and another person to be trustees in the place of retiring trustees. Upon a summons raising the question whether the retiring trustees might transfer the trust property to the persons so appointed:—*Held*, that a power of appointing new trustees being fiduciary, the donee of such a power cannot appoint himself:—*Held*, also, that the terms of the power required that the trustee or trustees to be appointed should be some person or persons "other" than the person or persons making the appointment:—*Held*, therefore, upon both these grounds, that the appointment was invalid. *In re* SKEATS' SETTLEMENT. SKEATS *v.* EVANS 522

2. —— *Trust for Wife's Next of Kin—Husband surviving Wife—Time for ascertaining Next of Kin.*] By a marriage settlement, dated in 1839, certain property of the wife was vested in trustees upon trust for the appointees of the wife, and, in default, for her for life for her separate use, and after her death for the husband for life, and, after the decease of the husband and wife, in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto in case the wife having survived the husband were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes.—The wife died in the lifetime of the husband. Her next of kin under the statute at her death and those persons who would have been her next of kin if she had survived her husband and died immediately after his death were not altogether the same, and the question was which of those two classes was to take:—*Held*, that the persons to take were those who would have been entitled to the wife's personal estate if she had survived her husband and died intestate immediately after him.—*Druitt* v. *Seaward* (31 Ch. D. 234), and *Re Bradley* (58 L. T. (N.S.) 631), not followed. CLARKE *v.* HAYNE - 529

—— Executory trust—Daughter, husband and children - - - - 54
See WILL. 1.

—— Perpetuity - - - - 494
See POWER. 4.

SHARES—Invalid allotment—Ratification 160
See COMPANY. 3.

—— Issue at a discount - - - 1, 98
See COMPANY. 4, 5.

—— Transfer—Liability of transferor - 209
See COMPANY. 7.

SHIP—Law of the flag—Conflict of laws
See CONFLICT OF LAWS.

SOLICITOR—*Bill of Costs—Taxation—S Limitations—Acknowledgment of Debt—Promise to pay—Authority of Solicitor.* Plaintiff being dissatisfied with his solici Defendant), instructed other solicitors, an in 1888 a document by which he authori requested the new solicitors to obtain and from the Defendant all deeds and othe ments belonging to the Plaintiff in the pos custody, or power of the Defendant as th tiff's solicitor, and also to obtain and recei the Defendant an account of his dealir transactions with the Plaintiff's land, &c., he was appointed my solicitor many years for such other period as you may think fit. the Plaintiff thereby authorized and reques Defendant to deliver up to the new solici such deeds, &c., and such account as af The new solicitors wrote to the Defendant ing him a duplicate of this document, s questing him to comply with it. Some spondence took place, in the course of whi Defendant wrote: "Does your client requ bill of costs from the date when I became h agent, or how otherwise?" The new solici the 26th of June replied, "Our client requires you to deliver particulars of any un bill of costs you may have against him." 4th of July the Plaintiff issued an origi summons against the Defendant, asking delivery and taxation of the Defendant's costs and the delivery up of deeds, &c., a containing any submission by the Plaintiff what should be found due on the taxatio the 31st of July an order was made for th very to the Plaintiff by the Defendant of a of his fees and disbursements in all suits, c or other matters of business in which he has employed as the attorney or solicitor for th plicant," for a reference to the Taxing Mas tax "the said bill," and for payment of the certified to be due from the Plaintiff to th fendant, or the Defendant to the Plai Liberty was given to the Plaintiff to pay Court £350, and upon doing so his docu were to be given up to him by the Defendant the Defendant's lien was to attach to the paid in. On the taxation of the bill deli under this order the Taxing Master struck certain items (without considering their priety) on the ground that, having regar their dates, they were barred by the Statu Limitations. On a summons to review the tion:—*Held*, by North, J., that the letter o 26th of June amounted to a sufficient ack ledgment to take the case out of the Statu Limitations; that the Plaintiff's new solic had authority to make the acknowledgme his behalf; and that, consequently, the Ta Master ought to have taxed the items which had struck out.—Whether under the com order obtained by a client to tax his solici bill of costs, the Taxing Master ought to st out (without taxing them) all statute-ba items, *quære.*—*Quincey* v. *Sharpe* (1 Ex. D. and *Skeet* v. *Lindsay* (2 Ex. D. 314) followed *Held*, by the Court of Appeal, that the object the order of the 31st of July was to ascertain t

)R—*continued.*

of costs for which the Defendant had a
l that it was the duty of the Taxing
o tax all the items of the bill without re-
the Statute of Limitations. CURWEN *v.*
- - - - - C. A. 424

— *Bill of Costs—Taxation—Third Party—*
—Petition of Course—Service of Order—
—Attorneys and Solicitors Act (6 & 7 *Vict.*
38.] R. and B. acted jointly in a sale of
ls to which their respective clients were
, B. having the conduct of the sale. The
er required the property to be enfran-
and wrote to B. asking him to arrange for
anchisement, and undertaking to pay his
and the expenses. R. made out his bill
against his own clients, sent it to B., who
the purchaser. The purchaser obtained
r for taxation of this bill on the usual pe-
f course by a third party. On motion by
stay all further proceedings under this
—*Held*, that the common form allegation
etition of course, that the solicitor "deli-
o your petitioners his bill of fees and dis-
ents," is a material allegation which is not
d by a merely constructive delivery; that
circumstances of this case there had been
very to the purchaser; and that the order
en irregularly obtained, and must be dis-
l.—Practice of the Taxing Masters as to
of the orders to tax stated.—Delivery and
ctive delivery to third parties liable to pay
ed and considered. *In re* ROBERTSON (A
TOR) - - - - - 553

—— *Lien—"Property recovered and pre-*
" — Action — Compromise — Payment of
—Notice of Lien—Payment after notice.]
ien of the solicitor of a Plaintiff for the
of an action attaches to money received by
aintiff by way of compromise where such
y is in substance the fruit of the action.—
e a valid compromise of an action has been
ed into under which a sum of money, the
of the action, is coming to the Plaintiff, the
dant or his solicitor is not at liberty after
ss notice by the Plaintiff's solicitor of his
to a lien for his costs, to pay that sum over
Plaintiff in disregard of such notice.—The
dant to an action paid £50 into Court in
action of all damages to which the Plaintiff
t be entitled. Before trial, by agreement
ed into between the Defendant and his soli-
on the one hand, and the Plaintiff without
licitor on the other, the action was compro-
upon the terms that the Plaintiff should
e the £50 in Court in discharge of all
s, and that the Defendant should do every-
necessary to enable the Plaintiff to get the
ut of Court.—The Plaintiff then gave his
or notice that he intended to appear him-
in person, and such solicitor gave to the De-
ant's solicitors (but not to the Defendant)
e not to pay the Plaintiff any money until
the solicitor's) costs in the action had been
. After the receipt of this notice, the Defen-
's solicitors obtained payment out to them-
es of the £50, and paid it over to the Plain-
—*Held*, first, that the £50 paid under the
sure of, and in order to settle the action,

SOLICITOR—*continued.*

must be treated as the fruit of the action.—*Held*, secondly, that the Defendant's solicitors having got out of Court and handed over the £50 to the Plaintiff, after express notice of his solicitor's lien for costs, must themselves satisfy that lien, and—*Held*, thirdly, that the Plaintiff was liable, but that as the Defendant had neither received notice of the lien, nor authorized the payment to the Plaintiff, he was not liable to satisfy the lien. ROSS *v.* BUXTON - - - - 190

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—— Solicitor's bill of costs—Taxation
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TIME—Motion to discharge order in Cha
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jections to title - -
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TITLE DEEDS—*Settled Estate—Custody able Tenant for Life.*] An equitable te
life of a settled estate declared entitle
custody of the title deeds upon underta
to part with them without the conse
trustees, and to produce them to the trus
all reasonable occasions. *In re* BURNA
TLED ESTATES - - - -

—— Custody of—Negligence -
See MORTGAGE. 1.

TOLLS - - - - -
See MARKET. 1, 2.

TRADE-MARK—*Fancy Word—"Disti "Common to the Trade"—Rectification Register—Patents, Designs, and Trade M* 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (1) (*c*), 74 (1) (*b*) (2) (3), 90.] The words " tinctive word" in sect. 74 (1) (*b*) relate the words "Distinctive . . . . or fancy in common use" in sect. 64 (1) (*c*), and "distinctive" in the latter section mus strued as applying to all the words that "Distinctive" in sect. 74 (1) (*b*) mea facie distinctive," so that any word whic primâ facie distinctive, is in reality c the trade must be disclaimed when re part of a combination.—The words "c the trade" in sect. 74 (1) (*b*) must be i in their ordinary grammatical sense as to "open to the trade," and are not defined by the explanation in sect. 74 (3 licly used by more than three persons." *v.* BROXBURN OIL COMPANY. *In re* TRADE-MARK - - - -

2. —— *Old Trade-mark or Design tion of Register—Patents, Designs, and T Act*, 1883, *s.* 90.] A word which has been under the Trade Marks Acts, as an mark, and which has remained on th for five years unchallenged, will never

E-MARK—*continued.*

ed if it be proved to have been used prior to istration not as a trade-mark but to specify cular pattern or design. *In re* HARRISON, EGOR & CO.'S TRADE-MARKS - - 691

—— *Resemblance calculated to deceive—n Particulars—Right to exclusive Use—Dis—Time—Patents, Designs, and Trade Marks* 83 (46 & 47 *Vict. c.* 57), *s.* 72 (2), *s.* 74 (2).] ation was made for registration of a trade-onsisting of the design of a heart in com-n with a number of words including ment Bank," the whole inclosed in a ular line, there being on the register a ark for the same class of goods consisting words "Pirie's Parchment Bank." The ap- was rejected on the ground of resemblance ed to deceive.—A disclaimer under sect. f the Patents, Designs, and Trade Marks 83, of the right to the exclusive use of a particular must be made in the applica- registration. *In re* GOODALL'S TRADE- - - - - - - - 566

NAME—*Imitation—Defendant using his me—Costs—Higher Scale.*] The Plaintiffs many years carried on the business of anufacturers under the name of Thomas & Sons. The Defendant John Turton many years carried on a similar business ame town, at first as John Turton, then Turton & Co. In 1888 he took his two o partnership and carried on the same as John Turton & Sons. There was no that the Defendants imitated the trade-r labels of the Plaintiffs or otherwise at-to deceive the public:—*Held* (reversing sion of North, J.), that although there obability that the public would be occa-misled by the similarity of the names, ntiffs were not entitled to an injunction ng the Defendants from the use of the hn Turton & Sons.—The Plaintiffs were to pay the costs of the action on the ale. TURTON *v.* TURTON - C. A. 128

ER OF BUSINESS—Winding-up of company - - - - 169
See COMPANY. 14.

-Executory—Settlement on daughter, husband and children - - 54
See WILL. 1.

cutory—Settlement on same trusts as legacy - - - - 62
See WILL. 3.

sale—Legacy—Interest - - 517
See INTEREST.

—*Costs improperly incurred—Solicitor Action against Trustees.*] The trustees will employed a solicitor to collect the allowed him to deduct from the rents osts. The tenant for life brought an ainst the trustees, alleging that some of were chargeable against corpus and not come, and that other of the costs had ecessarily incurred. The trustees al-t the tenant for life was aware of what done and had assented.—The Court hat the tenant for life had not assented, ed that the Defendants had been wrong

TRUSTEE—*continued.*

throughout:—*Held*, that the trustees must pay the costs of the action.—A trustee may select solicitors and agents; and so long as he selects persons properly qualified, he cannot be made responsible for their intelligence or their honesty; but he cannot entrust them with any duties which they may be willing to undertake, or pay them any remuneration which they may demand; and he is bound to exercise his discretion in the matter. *In re* WEALL. ANDREWS *v.* WEALL 674

2. —— *Defaulting Trustee of Will—Interest under Will acquired by Trustee—Assignee from Trustee—Making good Default—Beneficial Derivative Interest.*] The rule that a defaulting trustee cannot claim, as against his cestuis que trust, any beneficial interest in the trust estate until he has made good his default, and that his assignee is in no better position, even where the default has been committed after the assignment, applies not only to shares taken by the trustee under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate.—Mrs. D., an executor and trustee entitled under a will to a life interest in a trust fund, took assignments from two of the beneficiaries of their reversionary shares in the fund, and mortgaged the two shares so acquired to F. Mrs. D. was afterwards found a defaulter, and died insolvent:—*Held*, that F. took subject to all the equities against his mortgagor, and that the beneficiaries under the will were entitled to have the default of Mrs. D. made good out of the shares in the estate which had been acquired by her in priority to the claims of her mortgagee. DOERING *v.* DOERING - - - - - 203

3. —— *Investment of Trust Money—Option to take wrong Investment—Liability for wrong Investment.*] U., a trustee, who had power to invest on real security, invested on a mortgage of freehold houses, with power of sale, a larger sum of trust money than was justifiable. He afterwards retired from the trust, and transferred the mortgage to the new trustees. The security proving unproductive, the new trustees, with the privity of the Plaintiff, who was a purchaser of a share in the trust funds, but without any notice to U., sold the mortgaged property at a considerable loss, but it was not established that the sale was unfair or improvident. The Plaintiff then sued U. for the loss:—*Held*, by Kekewich, J., that a trustee who makes an improper investment is entitled, upon making good the trust fund, to have the investment returned to him; that the Plaintiff and the new trustees were therefore not justified in selling the property without notice to U., so that he might have an option of replacing the trust fund and taking to the mortgage, that U. therefore was not liable, and that the action must be dismissed:—*Held*, on appeal, that an investment on a security of a description authorized by the trust, where the breach of trust consists only in not exercising due caution in taking it, stands on an entirely different footing from an investment of an unauthorized description, which the cestuis que trust must either accept or reject; that the mortgage here became part of the trust estate, that the cestuis que trust could not therefore be under any obligation to U. to give him